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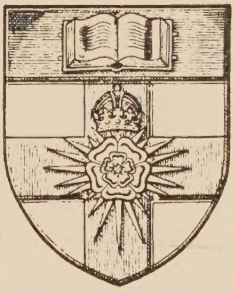

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1899.

THE

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MEMORANDUM.

COURT OF APPEAL.

The late Lord Justice Chitty.

1899. Feb. 16. This day the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lords Justices, the Judges of the Chancery Division, the Law Officers of the Crown, and many members of the Senior and Junior Bar, attended at the opening of Court of Appeal No. 1.

When the Judges had taken their seats,

The Lord Chancellor said:—I do not think we can begin the business of the day without some few words to give expression to the feeling which I am sure is deep in our hearts with regard to the grief and calamity which have fallen upon us. A great and distinguished man has been removed from our midst. Only last Friday he was sitting in his place. It would be easy, indeed, to speak of the public loss which we have all sustained, it would be easy to point out how great his judicial qualities were, and easier still, I think, to shew how rare some of those qualities are. But the truth is one can hardly speak of him, the man, without an emotion which to some extent interferes with the adequate expression of our feelings. I personally have had a lifelong friendship with the learned Judge both at the Bar and on the Bench, and I think no one can fail to have observed the loyalty, the straightforwardness, the manliness of the character of the friend we have all lost. We all must feel (I can speak for my colleagues as well as for myself) that a warm personal friendship existed between him and ourselves. We cannot but feel the loss we have sustained. The only thing I can say is that for ourselves we can wish no better record to leave behind us than

that which he has left to those who will cherish with a living memory all his qualities, and we could desire no record for ourselves better than this, that amidst the tears and lamentations of all those who knew him, and with the respect and love of all those by whom he was surrounded, he has been suddenly taken to his rest.

THE ATTORNEY-GENERAL. My Lord High Chancellor, my Lords,—On behalf of the Bar of England I wish to say a few words in endorsement of what has fallen from your Lordship. My Lord, like your Lordship, I can scarcely trust myself to speak of the loss that the Bar has sustained to-day. Eton, Oxford, Lincoln's Inn, the whole Bar, the whole Bench, are mourning with us at this moment. My Lord, there are many standing in this Court who, like your Lordship, remember Chitty as the generous colleague, the honourable opponent, the true friend. Though the memory of some may possibly not go back as mine can, all remember him as the Judge who gave to the advocate, however young he might be, patient attention and kind consideration. My Lord, he was the heir of a great name, a name renowned in English jurisprudence, a name cherished and revered by English lawyers; from his earliest days to the end he added but lustre to that name. It is true we can no longer enjoy that friendship which was to us an inestimable privilege, we can no longer admire those qualities which so distinguished him as a man and as a Judge. Rarely gifted, gifted as few men of my acquaintance have been, his gifts were adorned by a simple-mindedness and modesty of disposition which added greatly to our appreciation of those gifts. My Lord, as your Lordship has said, he has passed away under circumstances which perhaps he might have wished and thought to have been the best. There is one thing upon which we of the profession can at any rate pride ourselves, that he has left to the Bar of England, he has left to the Bench of England, an addition to those almost numberless examples of all that is best in the life and character of an English barrister, an English Judge, and an English gentleman.

ADDENDUM.

DINGLE *v.* COPPEN.

Page 747.

The judgment in this case as ultimately drawn up dealt with the costs of the counter-claim as follows: The defendant Coppen on redeeming the plaintiffs to have the general costs of the counter-claim, except so far as increased by his claim for damages in respect of the marsh lands, such costs to be taxed and set off against the plaintiffs' taxed costs of the action. If the defendant Coppen did not redeem, his counter-claim to stand dismissed with plaintiffs' costs of the action and counter-claim to be taxed and paid by him.

ERRATA.

Page	*Line*	*For*	*Read*
459	18	debtor	creditor [the error is in the report there cited].
485	4 from foot	1894	1895.
544	2 from foot	September 26, 1869, John Barnes	September 29, 1866, Thomas Barnes.

The Mode of Citation of the Volumes of the Law Reports, commencing January 2, 1899, will be as follows:—

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[1899] 1 Ch. [1899] 2 Ch.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

FIELDING *v.* MORLEY CORPORATION.

C. A. 1898 Aug. 4, 8.

[1895 F. 1139.]

Corporation—Statutory Powers—Negligence—Action—Injunction—Damages—Judgment—Costs—"Solicitor and Client"—Appeal—Interlocutory Application—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Act of Parliament—Title, Operation of.*

Sect. 1 of the Public Authorities Protection Act, 1893—which provides that, where in any action against any person for any act done in pursuance of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such act, duty or authority, a judgment is obtained by the defendant, it shall carry costs as between solicitor and client—applies to judgments in all actions in the Chancery Division for injunction or for damages, but not to appeals or interlocutory applications.

The title of an Act of Parliament is to be read as part of the enactments.

THIS was an action by a landowner in the parish of Halifax, Yorkshire, for an injunction to restrain the defendants, the mayor and corporation of Morley, from allowing the water passing along an aqueduct or conduit to their reservoir—the works having been constructed under a special Water Act—to overflow on to his land; also for an injunction to restrain the defendants from trespassing on his land, damages, and costs.

C. A. 1898 FIELDING v. MORLEY CORPORATION.

Upon the trial before Byrne J., he dismissed the action with costs; and, acting under s. 1 (*b*) of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) (1), and following the decision of Romer J. in *Harrop* v. *Ossett Corporation* (2), held that the defendants were entitled to solicitor and client costs. An appeal by the plaintiff from the whole of the judgment was, on August 4, 1898, upon the facts, dismissed "with costs." The question then again arose as to whether the defendants, the respondents, were entitled to solicitor and client costs under the above-mentioned Act. Upon this point their Lordships desired to hear argument.

O. Leigh Clare (*Cozens-Hardy, Q.C.*, and *Moulton, Q.C.*, with him), for the plaintiff, said that the point had not really been argued in the Court below, Byrne J. having expressed his intention of simply following the decision of Romer J. in *Harrop* v. *Ossett Corporation*. (2) He then submitted that, according to the true meaning of s. 1 of the Public Authorities Protection Act, 1893, a section intended to replace s. 264 of the Public Health Act, 1875, costs as between solicitor and

(1) The material part of s. 1 is as follows:—

"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:

"(*c*) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action."

(2) [1898] 1 Ch. 525.

client could not be allowed in such an action as the present. He then urged the same arguments as had been urged by Macmorran, Q.C., and himself in the case cited, adding that that case was distinguishable, being the case of a small-pox hospital which the Ossett Corporation were establishing, and which it was their positive duty to provide; whereas in the present case providing a water supply was not a positive duty though it might be convenient.

[CHITTY L.J. That will not do. I cannot see the distinction between a hospital for small-pox for the benefit of the inhabitants and a supply of water for the health of the inhabitants.]

Eve, Q.C., and *R. J. Parker*, for the defendants. The word "action" in the Act covers every action in the Chancery Division, whether it be an action for an injunction solely, or an action partly for damages, so that where judgment is given for the defendant simpliciter, the Court has no discretion in the matter, for the Act gives, as it says in terms, costs as between "solicitor and client."

Cur. adv. vult.

1898. Aug. 8. The judgment of the Court (Lindley M.R., Chitty and Collins L.JJ.) was delivered by

LINDLEY M.R. This case has been restored to the paper in order that we may dispose of the costs. The action was brought against the mayor and corporation of Morley in respect of an aqueduct which they were empowered to make across the plaintiff's land under a special Act of Parliament, and Byrne J. gave judgment for the defendants, and we affirmed his decision. At the trial, Byrne J., pursuant to the statutory authority which I will read presently, directed the costs of the defendants to be taxed as between solicitor and client, and Mr. Clare, on behalf of the plaintiff, says the learned judge was wrong.

Now the Act in question is 56 & 57 Vict. c. 61, which is intituled, "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." I read the title advisedly, because now, and for some years past, the title of an Act of

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Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament. Then the Act goes on: "Be it enacted . . . as follows: 1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament"—down to that point there is not much difficulty—"or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect." The first, (*a*), relates to the time within which the action must be brought. Then sub-s. (*b*) says: "Wherever in any such action a judgment is obtained by the defendant"—which is this case—"it shall carry costs to be taxed as between solicitor and client."

Now the question arises upon the construction of that Act of Parliament. It appears to me, and to all of us, that the section I have just read, occurring, as it does, in this Act passed in 1893, applies to all actions, including what used to be called "suits in Chancery": it applies to injunction actions as well as to actions for damages; and the dismissal of an action, which is the common form in the Chancery Division, is equivalent to judgment for the defendants. So far there is no doubt at all in our opinion. The section does not apply to appeals; nor does it apply to interlocutory applications; but it applies to the judgment in the action. Although the language is wide, the key to the enactment is that it is intended, as the title shews, to protect public bodies from expense when they are unsuccessfully sued in respect of acts done, or omitted to be done, in the exercise of statutory powers or duties, and the present case falls within the enactment. It is not necessary to consider what cases, if any, do not fall within the Act, although apparently within the words. I add that by way of precaution, because some day there will probably be a great discussion as to what acts or defaults do or do not come within it; but it is sufficient to say we think this case is clearly within the Act.

The judgment of Byrne J. as to costs is right, and the appeal will be dismissed simply with costs, as we said before.

Solicitors: *Firth & Co., for J. E. Craven, Todmorden; Sharpe, Parker & Co., for R. B. Hopkins, Morley.*

G. I. F. C.

LEVY *v.* STOGDON.

[1891 L. 2763.]

Sale of Reversion—Equitable Interest—Specific Performance—Delay.

S., in April, 1886, contracted to sell to K. the equitable reversion in a sum of Consols vested in trustees, the purchase to be completed on June 25, when an assignment was to be executed containing a covenant by the purchaser to pay succession duty and indemnify the vendor and his estate against it. The purchaser was to pay a deposit; and if the purchase was not completed on June 25, he was to pay interest on the balance of his purchase-money. The deposit was paid and the title investigated; when it appeared that the reversion was subject, along with other property, to heavy incumbrances which the vendor could not discharge, and from which the incumbrancers declined to release the reversion. In January, 1888, S. became bankrupt, and his property was sold, under which sale R. claimed title to the reversion. K.'s interest under the contract for sale became vested in B. In 1890 S. died. In 1895 the reversion fell into possession. No active step to enforce the contract for sale was taken till March 5, 1896, when B. obtained leave to attend proceedings in an action in which the estate of S. was being administered. He then took out a summons claiming the Consols, upon which summons an order of May 11, 1896, was made directing an inquiry who was entitled to them, with a provision that the applicant's claim was to be treated as if he had commenced an action for specific performance on March 5, 1896. The master found that R. was entitled, and Stirling J. affirmed his decision:—

Held, that, although the interest to which the contract related was purely equitable, so that the complete property in it could pass without a formal conveyance, B. could only obtain relief on the ground of specific performance; that the proviso in the order of May 11, 1896, was therefore right; that he was barred from relief by delay; and that the appeal ought to be dismissed.

THIS was an appeal by Birch from a decision of Stirling J. (1) By an agreement dated April 15, 1886, Sir John Sebright agreed to sell, and Keays to purchase, free from incumbrances,

(1) [1898] 1 Ch. 478.

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at the price of 3550*l.*, a sum of 21,667 11*s.* 5*d.* Consols, comprised in the vendor's marriage settlement, to which the vendor was entitled absolutely in reversion if there were no younger children of his marriage, but subject to the life interests of the vendor and his wife therein. The contract provided that the purchaser should pay 100*l.*, part of the purchase-money, upon the execution of the agreement, and the residue on June 25, 1886, the day fixed for completion. Clause 4: "On payment of the purchase-money at the time and in the manner aforesaid the vendor shall execute to the purchaser a proper assurance of the said sum of 21,667*l.* 11*s.* 5*d.* Consolidated 3*l.* per cent. Annuities subject to the said life interests therein, such assurance to contain a covenant by the purchaser for the payment of succession duty which will become payable on the death of the survivor of the vendor and his said wife and for indemnifying the vendor and his estate therefrom; and the said assurance shall be prepared by and at the expense of the purchaser, and shall be left by him before the said 25th day of June next at the office aforesaid." If the purchase was not completed on June 25, the purchaser was to pay interest on the residue of his purchase-money at 5*l.* per cent. per annum till completion. It was provided that the contract should not be made void by the death of the survivor of the vendor and his wife before June 25 then next.

Keays paid the deposit of 100*l.*, and an abstract of title was delivered. In January, 1887, Keays sent in requisitions, and in particular a requisition as to the discharge of heavy incumbrances which affected this reversion along with other property of the vendor. To this requisition the vendor's solicitors replied, "The incumbrancers will be paid off, or they will join in the assignment to the purchaser"; and on April 25, 1887, they stated, "The incumbrances shall be satisfied." Nothing was done towards paying them off, and an attempt to induce the incumbrancers to concur in the assignment failed. In July, 1887, a petition in bankruptcy was presented against the vendor. On November 3 a receiving order was made, and on January 26, 1888, he was adjudicated bankrupt. The creditors subsequently agreed to accept a composition, and on Septem-

ber 28, 1888, the bankruptcy was annulled. On the following day Sir J. Sebright and his trustee in bankruptcy, in pursuance of a scheme of arrangement with the creditors, executed an assignment of all the debtor's property to Baker in trust for Burr. Rumney, who with his incumbrancers was decided to be entitled to the Consols in dispute, claimed under this assignment.

After the bankruptcy of Sir J. Sebright nothing further was done as to the contract, except that on February 4, 1888, his solicitors wrote to Keays, saying that, as he had now become bankrupt, he could not proceed in the matter, and the contract must either be considered as cancelled, or must be completed by the trustees in bankruptcy, to whom they referred Keays. Keays wrote back refusing to treat the contract as cancelled, and calling upon Sir J. Sebright's solicitors to complete the title and carry out the sale.

On June 3, 1890, Keays assigned his interest under the agreement of April 15, 1886, to Pryer. On November 15, 1890, Sir John Sebright died. In 1891 all such interest, if any, as Keays had under the agreement of April 15, 1886, became vested in Birch. On May 22, 1895, Lady Sebright died; and on February 1, 1896, Pryer assigned all his interest under the agreement to Birch.

Up to that time no active steps had been taken to enforce the agreement of April 15, 1886, though on November 20, 1890, Keays had given notice of it to the trustees of the settlement.

On March 5, 1896, Birch obtained leave to attend the proceedings in this action. On April 24, 1896, he took out a summons claiming the Consols; and on May 11, 1896, an order was made directing an inquiry who was entitled to the 21,667*l.* 11*s.* 5*d.* Consols, and containing the following clause: "The applicant's claim is to be treated as though he had on March 5, 1896, commenced an action for specific performance of the agreement dated April 15, 1886."

The master in answer to this inquiry found that the Consols belonged to Rumney and his incumbrancers. Birch took out a summons to vary this certificate by finding that he was

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entitled to the Consols, or, in the alternative, that he had a lien on them for the 100*l.* and interest.

Stirling J. held that Birch had lost by delay all right to specific performance of the agreement of April 15, 1886, and was not entitled to the Consols, but that he had a lien on them for the deposit of 100*l.* with interest at 4*l.* per cent. per annum from April 15, 1886, and for his costs incurred in chambers.

Birch appealed, asking that he might be declared entitled to the Consols, and in the alternative that he was entitled to a lien for his costs incurred in court as well as in chambers.

Terrell, Q.C., and *Micklem*, for the appeal. The subject-matter of this contract was a purely equitable interest; no assignment of it by deed was necessary, and the right to it vested in the purchaser immediately on the execution of the contract, subject to the vendor's lien for the purchase-money: *Phillips* v. *Silvester* (1); *Rose* v. *Watson* (2); *Shaw* v. *Foster*. (3) There is, therefore, no case for specific performance, since no action could have placed the purchaser in any better position.

[LINDLEY M.R. You had nothing but a contract. The trustees of the settlement could not have transferred the fund to you unless you had an assignment.

CHITTY L.J. A purchaser must come promptly to obtain specific performance; that rule is not displaced by the vendor's having a bad title.]

The evidence is uncontradicted that the purchaser was always ready and willing to complete; there is no laches in not bringing an action which could not accomplish anything, as the vendor was not prepared to complete: *Scholefield* v. *Templer*. (4) The title of Birch under the agreement was complete ab initio, subject to the vendor's lien for the purchase-money, and effect ought now to be given to it. The order of May 11, 1896, is wrong in form. It ought not to have contained the clause as to an action for specific performance.

Haldane, Q.C., *Grosvenor Woods, Q.C.*, and *Theodore Ribton*,

(1) (1872) L. R. 8 Ch. 173.
(2) (1864) 10 H. L. C. 672.
(3) (1872) L. R. 5 H. L. 321.
(4) (1859) 4 De G. & J. 429, 434.

for Rumney, and *Jenkins, Q.C.*, and *Quin*, for mortgagees, were not called upon.

Butcher, Q.C., and *Medd*, appeared for the trustees; and *Dauney* and *E. Ford*, for other parties.

LINDLEY M.R. I think this is a desperate attempt to induce us to depart from those principles on which the Court invariably proceeds in adjudicating on demands of this description, whether you call them actions for specific performance or call them by any other name. On April 15, 1886, an agreement was entered into between Sir John Sebright and Mr. Keays by which Sir John agreed to sell to Mr. Keays an equitable reversionary interest in 20,000*l.*, represented by 21,667*l.* 11*s.* 5*d.* Consols. Sir John Sebright had a life interest in the fund, then his wife had a life interest, and then there was a contingent interest in the younger children of the marriage (if there were any), and subject to that the reversion was vested in Sir John. There were clauses in the agreement which have been read to the Court, and I need not read them again, which shew plainly that it was contemplated that there should be a formal deed of assignment, and that covenants should be entered into by the purchaser to pay succession duty, and to indemnify the vendor and his estate from it. That was the contract made in 1886, when, of course, the reversion was outstanding, and when, as Lady Sebright was alive, it was possible that there might be younger children. Now, ten years after the date of the contract, Sir John Sebright being dead, Lady Sebright also being dead, and there being no children, the purchaser, who has done nothing except pay a deposit of 100*l.*, comes and says, "Give me that fund." It appears to me that this claim, call it what you like, is one which cannot possibly be entertained. Now I will go a little further. The order of May 11, 1896, under which the present appellant comes to us, contains this clause: "The applicant's claim is to be treated as though he had on the 5th March, 1896, commenced an action for specific performance of the agreement dated the 15th April, 1886." Having regard to the terms of the contract, there does not appear to me to be anything wrong in the

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frame of that order. If there had been, of course the answer must have been, "You must get it put right before you appeal here on another matter." But, so far as I can see, there is nothing wrong in it, and the real footing, and the only footing upon which this claimant can come here claiming this fund, is the footing of specific performance. He has no right whatever to this reversion except upon the terms of the contract into which he has entered. If you once get that clearly in your mind, then it is unnecessary to discuss what has taken place since. There have been bankruptcies and assignments which complicate the case; but it all comes back to this—that for ten years the appellant and his predecessors in title have done nothing. He says that he could do nothing; but can he lie by until the reversion has fallen in, and then say, "Now I call for completion"? What is the remedy of a purchaser who cannot get what he wants? He can bring an action for specific performance, asking in the alternative for rescission of the contract and return of his deposit. He is not to lie by until the position of all parties is altered, and then, when the reversion falls in, to come and say, "Give me the fund." He has done absolutely nothing; and it would be unjust to everybody whose interest is concerned to give him what he wants. It seems to me that, as soon as you thoroughly understand the facts, this is an absolutely hopeless appeal, and must be dismissed with costs.

CHITTY L.J. I am of the same opinion, and I concur in thinking the appeal hopeless.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *W. P. W. Phillimore; H. Rumney; Hammond & Richards; Maples, Teesdale & Co; Janson, Cobb, Pearson & Co.*

H. C. J.

HOBBS, HART & CO. *v.* GROVER.

C. A. 1898 Nov. 16.

[1898 H. 3378.]

Building Owner—Party Wall—Notice—Sufficiency—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90.

A party-wall notice, given by a building owner to an adjoining owner under s. 90 of the London Building Act, 1894, ought to be so clear and intelligible as to enable the adjoining owner to see what counter-notice he should give under the provisions of the Act.

APPEAL by the plaintiffs against a decision of Channell J. as Vacation Judge.

The plaintiffs were the owners of the house No. 76, Cheapside, in the City of London; the defendant had lately purchased the adjoining house No. 75, which he intended to pull down and rebuild. Between the two houses was a wall, which was admitted to be a party wall within the meaning of the London Building Act, 1894. The defendant on September 2, 1898, served on the plaintiffs a notice which purported to be a party-wall notice under s. 90 (1) of the Act.

(1) Sect. 5, sub-s. 20: "The expression 'party structure' means a party wall, and also a partition, floor, or other structure separating vertically or horizontally buildings, storeys, or rooms approached by distinct staircases or separate entrances from without."

Sub-sect. 31: "The expression 'building owner' means such one of the owners of adjoining land as is desirous of building, or such one of the owners of buildings, storeys, or rooms separated from one another by a party wall or party structure as does or is desirous of doing a work affecting that party wall or party structure."

Sub-sect. 32: "The expression 'adjoining owner' means the owner or one of the owners . . . . of land, buildings, storeys, or rooms adjoining those of the building owner."

Sect. 88 confers on a building owner various "rights in relation to party structures" (inter alia)

"(1.) A right to make good, underpin, or repair any party structure which is defective or out of repair:

"(2.) A right to pull down and rebuild any party structure which is so far defective or out of repair as to make it necessary or desirable to pull it down."

Sect. 89, sub-s. 1: "Where a building owner proposes to exercise any of the foregoing rights with respect to party structures, the adjoining owner may by notice require the building owner to build on any such party structure such chimney copings, jambs, or breasts or flues, or such piers or recesses, or any other like works as may fairly be required for the convenience of such adjoining

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The notice was as follows: "I, the undersigned, being the building owner of No. 75, Cheapside, in the City of London,

owner, and may be specified in the notice, and it shall be the duty of the building owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building owner or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right.

"(2.) Any difference that arises between a building owner and adjoining owner in respect of the execution of any such works shall be determined in manner in which differences between building owners and adjoining owners are hereinafter directed to be determined."

By s. 90, sub-s. 1, "A building owner shall not, except with the consent in writing of the adjoining owner and of the adjoining occupiers, or in cases where any wall or party structure is dangerous (in which cases the provisions of Part IX. of this Act shall apply), exercise any of his rights under this Act . . . . in relation to any party wall or party structure, other than a party fence wall, unless at least two months before doing so he has served on the adjoining owner a party wall or party structure notice, stating the nature and particulars of the proposed work, and the time at which the work is proposed to be commenced."

Sub-sect. 5: "Within one month after receipt of such notice the adjoining owner may serve on the building owner a notice requiring him to build on any such party structure any works to the construction of which he is hereinbefore declared to be entitled."

Sub-sect. 6: "The last-mentioned notice shall specify the works required by the adjoining owner for his convenience, and shall if necessary be accompanied by explanatory plans and drawings."

Sub-sect. 7: "If either owner do not within fourteen days after the service on him of any notice express his consent thereto, he shall be considered as having dissented therefrom, and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner."

Sect. 91 provides for the settlement of a difference "between a building owner and adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of the Act" (Part VIII.) "relates" by (unless both parties consent in the appointment of one surveyor) the appointment of a surveyor by each party and the selection of the two surveyors so appointed of a third surveyor, "and such one surveyor or three surveyors, or any two of them, shall settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner, with power by his or their award to determine the right to do and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference, but any time so appointed for doing any work shall not, unless otherwise agreed, commence until after the expiration of the period by this part of this Act prescribed for the notice in the particular case."

A limited right of appeal from the award is given.

Sect. 187 provides that notices under the Act shall be in writing.

hereby give you notice that upon the expiration of two months from the date hereof I intend to exercise the rights conferred upon the building owner by s. 88 of the above Act in respect of the party structure separating No. 75, Cheapside, from No. 76, Cheapside, adjoining thereto on the east side thereof—that is to say, to execute such of the following works to the said party structure as may on survey be found necessary or desirable—namely, to make good, underpin, or repair the same where defective or out of repair; to pull down and rebuild the same wholly or in part if (1.) so far defective or out of repair as to make such operations necessary or desirable; (2.) not conformable with the regulations of the said Act; (3.) of insufficient strength for the intended new building; to raise or underpin the same, or any external wall built against the same, as may be necessary or desirable for the intended new building; to cut into the same for any lawful purpose; to cut away any footings, chimney breasts, jambs, flues, or other projections as may be necessary in order to erect the intended new building; to cut away or take down such parts of any wall or building of the adjoining owner as may be necessary in consequence of the same overhanging the ground of the building owner in order to erect the intended new building; to perform any other necessary works incident to the connection of the said party wall with the premises adjoining thereto, the work to be commenced on December 27, 1898."

This notice was to a great extent in substance a copy of s. 88 of the Act.

The plaintiffs objected that this was not a sufficient notice under s. 90, because it did not state "particulars of the proposed work"; and they applied for an injunction to restrain the defendant from pulling down, cutting into, underpinning, raising, or otherwise injuring or interfering with the party wall between the two houses, and from appointing any surveyor under s. 91 of the Act, until the trial of the action or further order, otherwise than in accordance with the provisions of the Act.

The learned judge was of opinion that the earlier part of the notice was good, and he was not clear that any part of it was

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bad; but he had some doubt whether the defendant ought not to give fuller particulars as to the raising of the party wall. That question, however, might not arise for many months.

An order was made that, upon the undertaking of the defendant not to act upon that part of the notice which dealt with raising the wall, without giving the plaintiffs further notice (without prejudice to any question), and to give the plaintiffs inspection of his plans, and a further period of ten days in which to appoint a surveyor, there should be no order upon the motion, except that the costs should be costs in the action.

The plaintiffs appealed.

Mulligan, *Q.C.*, and *Gatey*, for the plaintiffs. The giving of a proper notice under s. 90, sub-s. 1, is a condition precedent to the exercise by the "building owner" of any of the rights given to him by s. 88. The notice which the defendant has served is not a proper notice. It does not state "the nature and particulars of the proposed work," which must mean the work which will affect the party wall. These words were not in s. 85, the corresponding section of the Metropolis Management Act, 1855, which is now repealed. Unless the plaintiffs know what it is that the defendant proposes to do to the party wall, it would be impossible for them to give a counter-notice under sub-s. 5 of s. 90.

[They were stopped by the Court.]

Alexander, *Q.C.*, and *A. H. Jessel*, for the defendant. The Act must be construed so that it will work practically. A "difference" has arisen between the parties within the meaning of s. 91, and it should be settled by arbitration, as provided by that section. However detailed a notice is given by the building owner, only such works can be executed as are sanctioned by two of the three surveyors. How is it possible to give a notice in detail before the building owner knows what is the condition of the party wall? And he cannot know this with certainty until after he has begun his works. If the notice is not valid unless it describes in detail the works which it is proposed to execute, it might not be possible to give it until the old buildings had been pulled down, and then the ground would

have to be left vacant for two months. This cannot have been intended.

[CHITTY L.J. Should not the notice be such as will enable the adjoining owner to judge whether he shall consent or object to the proposed works?

VAUGHAN WILLIAMS L.J. Ought not the notice to give such particulars of the proposed works as will enable the adjoining owner to judge whether it will be necessary to pull down the old wall?]

Under s. 91, the surveyors have power to determine the sufficiency of the notice. The form which has been used in this case is one which has been used by London architects.

[LINDLEY M.R. How can the notice be sufficient unless it enables the adjoining owner to see what counter-notice he should give under s. 89? Is it sufficient if the notice is expressed in such general terms that the adjoining owner cannot tell what works he should require to be executed under s. 89?]

Ultimately the defendant consented to amend his notice in accordance with the view taken by the Court.

LINDLEY M.R. In my opinion the notice ought to be so clear and intelligible that the adjoining owner may be able to see what counter-notice he should give to the building owner under s. 89. This is the key to the whole matter.

CHITTY and VAUGHAN WILLIAMS L.JJ. concurred.

The following is a copy of the order as drawn up by the registrar:—

The defendant by his counsel undertaking on or before November 23, 1898, to serve an amended notice, stating the kind and extent of buildings he proposes to erect, and to give the plaintiffs a month from service of the amended notice for giving their counter-notice, and the plaintiffs by their counsel consenting to the defendant's retaining the benefit of the notice dated September 2, 1898, so that the defendant can commence work on December 27, 1898, this Court doth by consent order that all further proceedings in this action be stayed.

Solicitors: *Savery & Stevens; Emanuel & Simmonds.*

W. L. C.

C. A.
1898
KEKEWICH J.
Oct. 28.
C. A.
Nov. 30.

CUMMINS *v.* PERKINS.

[1897 C. 2701.]

Receiver—Appointment—Jurisdiction—Married Woman—Judgment for Costs "to be payable out of her Separate Property and not otherwise"—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.

An action by a married woman "suing in respect of her separate estate" was at the trial dismissed with costs, to be taxed and "payable out of her separate property, but not otherwise." The only separate property of the plaintiff consisted of a share coming to her under a will. Before the taxation of the defendants' costs had been completed by certificate, the trustees of the will being about to distribute their estate and pay the plaintiff her share, the defendants applied for the appointment of a receiver to receive the share and hold it as security for the costs when taxed:—

Held, by the Court of Appeal, that, on the principle of *Kearns* v. *Leaf*, (1864) 1 H. & M. 681, independently of s. 25 of the Judicature Act, 1873, there was jurisdiction to protect by injunction or the appointment of a receiver the fund out of which the costs were payable, and that a receiver ought to be appointed.

Decision of Kekewich J. affirmed.

THIS action was brought in August, 1897, by the plaintiff Elizabeth Cummins, as a "married woman suing in respect of her separate estate," against the defendants, her former solicitors, for damages for alleged negligence and misrepresentation.

The action came on for trial on July 22, 1898, when judgment was pronounced dismissing the action and ordering the plaintiff to pay to the defendants their taxed costs, such costs "to be payable out of the plaintiff's separate property, and not otherwise." The judgment directed that the defendants' taxed costs should be paid within twenty-one days after service of the order and of the taxing master's certificate.

The judgment was duly passed and entered, and the defendants carried in for taxation a bill of costs amounting to 270*l.*, but the taxation had not yet been completed, owing partly to the fact that the taxation proceedings commenced just on the eve of the Long Vacation, and partly, it was said, to the

plaintiff's delay in attending the proceedings, though this she denied.

The plaintiff's only separate estate consisted of her share under the will of her sister Sarah Ellis, deceased. The trustees of the will were about to distribute the estate, and pay the plaintiff her share, whereupon the defendants, fearing they would lose the benefit of the judgment, moved for the appointment of a receiver of the share. The motion was heard before Kekewich J. on October 28, 1898.

Warrington, Q.C., and *Waggett*, for the defendants, in support of the motion. We ask for the appointment of a person to receive the plaintiff's share under the will and hold it until the amount due to us on the taxation is paid. The case is covered by *In re Peace and Waller*. (1) The only distinction between the two cases is, that there a certificate was made by the taxing master, whereas here there is no certificate. If the plaintiff obtains the control of this fund, we shall get nothing. Therefore we ask that the fund may be protected to answer our costs.

Renshaw Q.C., and *Peterson*, for the plaintiff. This motion is misconceived. The defendants are coming here to have equitable execution, but, according to the established practice, to entitle them to equitable execution they must be in a position to get legal execution, and they cannot be in that position until the costs are ascertained by certificate, and the order has been served as directed: *In re Shephard* (2); *Waddell* v. *Waddell*. (3)

KEKEWICH J. It appears to me that, in order to arrive at a decision on this case, it is better to dismiss from one's mind the question of execution, whether legal or equitable. My opinion at the present moment is that the introduction of the word "execution" into the matter only confuses the position. The facts are these. The plaintiff has been ordered to pay to the defendants certain costs, of which the maximum amount is

(1) (1883) 24 Ch. D. 405. (2) (1889) 43 Ch. D. 131, 137.
(3) [1892] P. 226.

C. A. 1898 CUMMINS v. PERKINS. Kekewich J.

270*l.* though the real amount cannot be ascertained until after the taxation is completed. But there is a judgment against the plaintiff to pay the costs when ascertained, not exceeding 270*l.*, out of her separate estate. It has been proved that she has no separate estate except her share under the will of Sarah Ellis. Therefore the order is that the plaintiff shall pay the defendants' costs out of her share of the estate of Sarah Ellis. The plaintiff desires to receive her share in full and snaps her fingers at the defendants, telling them to get their costs when and as they can. I am disposed to take the view that the Court ought to interfere if it can; but I am told that such a course is entirely without precedent and contrary to the established rules of the Court. I am not satisfied of that. In my opinion the plaintiff ought not to have her share in full while these costs are outstanding. I shall therefore appoint the defendants receivers, without salary, of the share of the plaintiff in the estate of Sarah Ellis to the extent of 270*l.*, but it is only to stand as a security for the amount actually found due to the defendants on their bill of costs, and I make an order accordingly. The order must, however, be subject to prior charges, if any.

G. I. F. C.

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The plaintiff appealed. The appeal was heard on November 30, 1898.

Renshaw, Q.C., and *Peterson*, for the plaintiff, argued (as they did in the Court below) that, the costs not having been taxed, and the amount payable under the judgment not having been ascertained, the defendants could not have levied legal execution, and could not, therefore, have equitable execution by the appointment of a receiver. In addition to the cases cited in the Court below they referred to *Robinson* v. *Pickering* (1); *Beddow* v. *Beddow* (2); *Harris* v. *Beauchamp* (3); *Holmes* v. *Millage*. (4)

[LINDLEY M.R. Before the Judicature Act, in such cases as *Kearns* v. *Leaf* (5), it was held that, when a person had a

(1) (1881) 16 Ch. D. 371, 660.
(2) (1878) 9 Ch. D. 89.
(3) [1894] 1 Q. B. 801.
(4) [1893] 1 Q. B. 551, 555.
(5) 1 H. & M. 681.

right to payment out of a particular fund, the Court could protect the fund by injunction.]

In that case the right to payment out of the fund was given by contract. In the present case the judgment creates no charge on the separate property. Till a creditor has established his right to payment by a judgment which he is in a position to enforce the Court will not restrain the debtor from dealing with his property, and the same principle applies to a married woman's separate property.

Warrington, Q.C., and *Waggett*, for the defendants, were not called upon.

LINDLEY M.R. It appears to me that the order of Kekewich J. is founded upon perfectly intelligible and sound principles. Judgment has been given against the plaintiff, a married woman, for the payment of the defendants' costs, which are by the judgment to be payable out of her separate property. She has no separate property, except a share to which she is entitled under her sister's will, which is admitted to belong to her for her separate use. The costs have not yet been taxed. The learned judge was of opinion that this fund was in danger—that is to say, that the plaintiff was in a position to get it and would do so, and if she obtained possession of it the defendants would not get their costs. Thereupon the learned judge did that which I think he had ample jurisdiction to do—he appointed a receiver to protect that share and to preserve it, in order that it may be applied in accordance with the judgment which the defendants had obtained. It is said that this order was wrong. It is said that it amounts to "equitable execution," and there has been some discussion upon that footing. But we are dealing with equitable estates and a judgment that a debt is to be paid out of a particular equitable estate. That being so, the authorities, which were very familiar thirty-five or forty years ago, shew plainly that, quite independently of the Judicature Act, 1873, if a plaintiff had a right to be paid out of a particular fund he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights. He might not have had a specific charge on the fund so as to give him priority;

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but, after a long series of decisions—there was some doubt about it at one time—the Court settled that a person who had a right to be paid out of a particular fund could obtain an injunction (and if an injunction, it followed on principle that he could obtain a receiver) in a proper case to protect the fund from being misapplied. That is the principle on which the learned judge has acted here—a perfectly sound principle, even without invoking the aid of s. 25 of the Judicature Act. But the introduction of that section does not curtail the power of the Court to grant injunctions or to appoint receivers: it enlarges it. It has not revolutionised the law, but it has enabled the Court to grant injunctions and receivers in cases in which it used not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did so, as, for example, in trespass and in the case of a first mortgagee who was out of possession. There is absolutely nothing wrong in the order. The appeal fails, and must be dismissed with costs.

CHITTY L.J. I am of the same opinion. The receiver has been appointed for the protection of the fund out of which, according to the judgment, the defendants' costs, when the taxation is completed, are to be paid. It seems to me that that falls within the principle of the case to which the Master of the Rolls referred during the argument—*Kearns* v. *Leaf*. (1) No doubt in that case the right to be paid out of the fund was created by contract; but I can see no difference in principle between such a case and one in which the right is conferred by an order of the Court. I agree that the order does not create a special charge on the fund so as to give any priority, but it does give a right to have the fund protected out of which alone the payment is to be made. It gives, as Wood V.-C. said in *Kearns* v. *Leaf* (1), such a species of interest in the fund as entitled the then plaintiff to interfere and save the fund from being wasted. On that principle I think the order of Kekewich J. was properly made and ought to be maintained. I agree that s. 25 of the Judicature Act has to some extent

(1) 1 H. & M. 681.

enlarged the powers of the Court; but upon the present occasion I do not think it is necessary to enter into any discussion as to the particular effect of that section.

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Solicitors: *A. W. Mills; Chester & Co.*

W. L. C.

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[1897 P. 0126.]

In re ROSS' CHARITY.

[1897 R. 055.]

Charity—"Ecclesiastical Charity"—Parish Council—Appointment of Trustees—Churchwarden Trustees—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 14, *sub-ss.* 1, 2; *ss.* 70, 75, *sub-s.* 2.

The founder of an eleemosynary charity by her deed of endowment declared that the objects of the charity should be selected by the trustees thereof (one of whom was to be the rector of the parish) from amongst poor men and women resident in a certain parish who should have (1.) regularly attended divine service in the church of the parish for a fixed period, (2.) been partakers of the Holy Communion, (3.) lived a godly, righteous, and sober life to the glory of God's Holy Name; and she also declared that the lay trustees should always be members of the Church of England:—

Held, that the charity was one for the benefit of members of the Church of England "as such," i.e., in their character of members of that Church, and to the exclusion of non-members thereof, and was accordingly an ecclesiastical charity within s. 75 of the Local Government Act, 1894; and held, therefore, that the parish council had no power, under s. 14, sub-s. 1, of the same Act, to appoint trustees of it.

In s. 75, sub-s. 2 (*e*), of the Act of 1894, the words "or otherwise for the benefit of any particular Church . . . or any members thereof as such" are not to be construed as limited to religious "benefit," to the exclusion of mere temporal benefit.

There may be a charity in the legal sense for purposes which are both eleemosynary and ecclesiastical or religious.

The decision of Stirling J., [1898] 1 Ch. 391, affirmed.

A testatrix by her will (made in 1799) devised a rent charge to be paid to the churchwardens for the time being of the parish of B. H. on a certain day in every year for ever, and to be laid out in the purchase of garments to be given to "six old and poor widows of the said parish whom they

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shall judge the properest objects to receive the same with preference to those who not being disabled by infirmity or sickness are most constant in their attendance on the public service of the church."

Held, first, that the charity thus created was not an ecclesiastical charity within the meaning of the Local Government Act, 1894; and, secondly, that s. 14, sub-s. 2, of that Act had application to the case of a non-ecclesiastical charity, the only trustees of which were churchwardens, and accordingly that the parish council had power to appoint trustees of such a charity in place of the churchwardens.

The decision of North J., [1897] 2 Ch. 397, affirmed.

APPEALS from Stirling J. and North J. respectively.

These two appeals were heard together as they involved a question common to both—namely, whether the parish councils of the parishes, for the poor of which the two charities before the Court were founded, are entitled to appoint trustees of the charities under s. 14 of the Local Government Act, 1894. This depended upon whether these charities are or are not ecclesiastical charities within the meaning of s. 75 of the same Act. The appeal in *In re Ross' Charity* raised the further question whether s. 14, sub-s. 2, of the same Act authorizes a parish council to appoint trustees in the place of churchwardens who are the only trustees of a non-ecclesiastical charity.

In re PERRY ALMSHOUSES.

The appeal in this case was taken first. The facts are fully given in the report of the hearing before Stirling J. (1), and the following short statement of them will be sufficient for the purposes of this report. The charity was founded by a deed (dated in 1851) whereby the founder conveyed a piece of land and certain cottages in course of erection thereon in the parish of Winterbourne to the rector of the parish and three other persons in fee upon trust, that they and the survivors and survivor of them, and the heirs of such survivor, their or his assigns, should permit such poor men and women of sound mind who should have attained the age of sixty years or be incapable of wholly maintaining themselves by manual labour and who having been born within the parish of Winterbourne should have resided there for the last five years, or having

(1) [1898] 1 Ch. 391.

been born elsewhere should have resided within the said parish for the last ten years, "and who (not being let by sickness or some other urgent cause) shall have attended divine service at the church of the parish of their respective residences for the time being every Sunday for the last five years of their respective lives and been partakers of the Holy Communion and lived a godly righteous and sober life to the glory of God's Holy Name, as the trustees for the time being of the charity hereby established or any three of them shall from time to time select to occupy the said cottages. . . . Provided . . . that every future incumbent of the rectory of Winterbourne aforesaid shall by virtue of his office of rector thereof be a trustee of the said charity." Then followed provisions that as often as that rectory should become void by the death, resignation, or deprivation of the present or any future incumbent or otherwise, and any other clerk should be inducted, the said piece of ground and cottages should be so conveyed as to become vested in the new incumbent jointly with the laymen who should for the time being be trustees of the said charity, and that when the place of any of the three present lay trustees should "become vacant by his death ceasing to be a member of the United Church of England and Ireland or resignation or otherwise," the surviving or continuing lay trustees, or, failing them, the rector for the time being, should appoint "some other layman who shall be a member of the United Church aforesaid" to be a trustee of the said charity in the room of the layman whose place should have become vacant.

Stirling J. held that this was a charity the endowment of which was held for the benefit of members of the Church of England as such, and was therefore an ecclesiastical charity within s. 75 of the Local Government Act, 1894. From this decision the Charity Commissioners appealed.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants. The question is whether this is an "ecclesiastical charity" within the meaning of the Local Government Act, 1894, s. 75, sub-s. 2. Clause (*e*) of that sub-section is the only one which could be here applied, and that clause defines such a charity as

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one "for the benefit of any particular Church or denomination, or of any members thereof as such." Is this charity for the benefit of members of the Church of England only? It is laid down in *Attorney-General* v. *Calvert* (1) that different considerations apply to educational and eleemosynary charities. In the latter membership of a particular body is not readily to be inferred; a conformity to certain rules only is required. The same principle is recognised in *Attorney-General* v. *St. John's Hospital, Bath.* (2) Here the settlor when she meant to require that persons should be members of the Church of England said so. She said that the trustees were to be members of that Church, but did not say that the poor men and women were to be so. If the rule was that no one is entitled to partake of the Communion in the Church of England except a member of that Church, there would be a great difficulty in our way; but that is not the rule. A clergyman cannot reject any one who is not "an open and notorious evil liver," or "a common and notorious depraver of the Book of Common Prayer": *Jenkins* v. *Cook.* (3) Members of other sects may receive the Communion in the Church of England: May's Constitutional History of England, vol. ii. 346.

If a person has complied with the conditions of the deed by conformity, the trustees cannot go behind that, nor can the Court. This charity cannot be held to be for the benefit of any particular Church: can it be said to be for the benefit of any members of it as such? Suppose the trust had been for persons who had attended the Wesleyan Chapel for five years and partaken of Communion there: could it be said that this confined the benefit of the charity to Wesleyans?

According to the judgment of the House of Lords in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4), charity in its legal sense comprises four principal divisions: (1.) trusts for the relief of poverty, (2.) trusts for the advancement of education, (3.) trusts for the advancement of religion, and (4.) trusts for other purposes beneficial to the community. Of these the two main divisions, numbers (1.) and (3.), corre-

(1) (1857) 23 Beav. 248.
(2) (1876) 2 Ch. D. 554.
(3) (1876) 1 P. D. 80.
(4) [1891] A. C. 531, 583.

spond to and constitute the two species of charities called eleemosynary and ecclesiastical. The present charity is a purely eleemosynary charity, and no such charity can be an ecclesiastical charity within the Local Government Act, 1894. According to s. 75, sub-s. 2, of that Act, "The expression 'ecclesiastical charity' includes," i.e., means, "a charity the endowment whereof is held for some one or more of the following purposes." Five sets of purposes are then specified. The first four sets are all purposes appropriate to ecclesiastical charities, i.e., purposes for the advancement of religion, and, according to the natural construction of the section, the fifth and final set of purposes for which the endowments of ecclesiastical charities are held, namely, those in clause (*e*), would be for the advancement of religion also; for it cannot be supposed that the Legislature intended in this final sub-section to include eleemosynary charities by a sidewind. The final clause is manifestly by way of supplementing the others: "For the benefit of . . . . any member" (of any particular Church or denomination) "as such," must therefore mean for the religious benefit of such members in their character of members of that Church. And we submit that this endowment cannot be said to be for the religious benefit of any members of the Church of England in their character of members of that Church. The founder has made no distinct conditions to that effect; inference, if there were any, would not be sufficient. But there is none. Her intention as disclosed by the deed was that conformity and not membership should be the test. The case falls within the principle of *Attorney-General* v. *Calvert* (1); and no person who can conscientiously comply with the requirements of the founder can be excluded from the benefit of the charity because he or she was not a member of the Church of England.

[In other respects the arguments for the appellants were similar to those addressed to Stirling J., which are fully given in the report of the hearing before his Lordship; and the only additional authorities referred to were *Escott* v. *Mastin* (2) (where it was held that a child baptised by a layman (or Wesleyan Methodist) was held not to be "unbaptised" within

(1) 23 Beav. 248. (2) (1842) 4 Moo. P. C. 104.

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the meaning of the rubric in the Book of Common Prayer); the Uniformity Act (13 & 14 Car. 2, c. 4); the Toleration Act, 1711 (10 Anne c. 6); 2 Stephens on the Book of Common Prayer (Eccl. Hist. Soc. Pub.) 1070, 1071.]

Swinfen Eady, Q.C., and *Danckwerts*, for the respondents, the trustees of the Perry Almshouses. The question who are the persons whom the founder intended to be the objects of this charity is a pure question of the true construction of the deed of endowment. She required the recipients of her charity to do the acts which would most openly shew their membership of the Church of England, and which no one but a conforming member of that Church could properly do. She required them to reside in the parish and to attend divine service at the parish church for a fixed period, and to partake of the Holy Communion. These are obvious tests of membership. Further, she made the rector of the parish for the time being (who is necessarily a member of the Church of England) a trustee of the charity by virtue of his office, and prescribed that all the other trustees should be members of the Church of England, and that directly they ceased to be so they should ipso facto cease to be trustees of the charity. We submit that she could not have shewn more clearly that she intended to benefit poor members of the Church of England to the exclusion of all other Churches and denominations.

[They also made use of the other arguments reported below.]

LINDLEY M.R. It would be convenient that the reply on this appeal should be deferred, and that the second appeal should now be opened.

In re ROSS' CHARITY.

The facts of this case are fully given in the report of the hearing before North J. (1), and were shortly as follows:—

Mary Ross by her will dated in 1799 charged certain premises thereby devised with the payment of an annual rent-charge of 3*l.* to the churchwardens for the time being of the parish of Bishop's Hatfield in trust that such rent-charge should be

(1) [1897] 2 Ch. 397.

paid on a certain fixed day in every year for ever to the said churchwardens for the time being, and be laid out by them in the purchase of garments to be given "to six old and poor widows of the said parish of Bishop's Hatfield whom they shall judge the properest objects to receive the same with preference to those who not being disabled by infirmity or sickness are most constant in their attendance on the public service of the church."

The parish council of Bishop's Hatfield, in pursuance of s. 14, sub-s. 2, of the Local Government Act, 1894, appointed trustees of the charity in place of the churchwardens; and North J., affirming the determination of the Charity Commissioners, decided that the charity was not an ecclesiastical charity within s. 75, sub-s. 2, of the Local Government Act of 1894; and that the appointment by the parish council of trustees of the charity in the place of the churchwardens was valid.

The churchwardens appealed.

Lord Robert Cecil, for the appellants. This is an ecclesiastical charity. The intention of the testatrix was to benefit the Church of England, or certain of its members as such members. If the gift had been to those persons who were most constant in their attendance at a Wesleyan church or at mass, would it not have shewn an intention to benefit the Wesleyan or the Roman Catholic Church, or the members of those Churches respectively? A gift is for the benefit of a particular Church or denomination or of the members thereof, if the members of the particular Church or denomination get an advantage by reason of their membership, and it is immaterial whether the benefit is large or small: *Attorney-General* v. *Ruper.* (1) The officers of a Church are the representatives of the body of the Church: Steers' Parish Law, ch. 6, s. 1, 5th ed. p. 96; and a gift to the officers of a Church is a gift to the Church. The case comes within the principle applied by the House of Lords in *Shore* v. *Wilson.* (2)

But supposing that this charity is not an ecclesiastical

(1) (1722) 2 P. Wms. 125. (2) (1842) 9 Cl. & F. 355.

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charity, then I contend that s. 14, sub-s. 2, of the Local Government Act, 1894 (1), does not apply to a non-ecclesiastical charity the endowment of which is vested in churchwardens only. The section is in two portions. The first enactment applies to a case where the "overseers as such are, either alone or jointly with any other persons trustees of any parochial charity." That is clearly inapplicable. The second enactment deals with the case of a non-ecclesiastical charity, but it is only to apply "as if the churchwardens as such were specified therein as well as the overseers"; and in the present case there are no overseer trustees at all. So the case of churchwardens who are trustees of a charity as churchwardens is not dealt with at all in this sub-section, and the sub-section only deals with cases where overseers are trustees, or overseers and churchwardens as overseers.

In other parts of the Act "overseers" are treated as one body, and "churchwardens and overseers" as another and distinct body: ex gr., in s. 5, sub-s. 2 (*c*), where secular property vested in either of those bodies is vested in the parish council; and certain powers not relating to affairs of the Church or to an ecclesiastical charity are transferred to the parish council. But all the powers and duties of churchwardens as such as to all charities are left untouched by the Act; and the reason for this no doubt is that all charities vested in churchwardens alone are per se ecclesiastical authorities.

[The arguments of the learned counsel were in other respects similar to those in the Court below.]

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, supported the decision of North J., and made use of the arguments already reported in the Court below.

Lord Robert Cecil, in reply.

Cur. adv. vult.

(1) Sect. 14, sub-s. 2, of the Local Government Act, 1894, is as follows: "Where overseers of a rural parish as such are, either alone or jointly with any other persons, trustees of any parochial charity, such number of the councillors of the parish or other persons, not exceeding the number of the overseer trustees, as the council may appoint, shall be trustees in their place, and, when the charity is not an ecclesiastical charity, this enactment shall apply as if the churchwardens as such were specified therein as well as the overseers."

1898. Nov. 17. LINDLEY M.R. The questions raised by these appeals are whether the parish councils of the parishes, for the poor of which these charities are founded, are entitled to appoint new trustees of the charities under s. 14 of the Local Government Act, 1894 (56 & 57 Vict. c. 73). The questions in both cases resolve themselves into the narrower question whether these charities are ecclesiastical charities within the meaning of s. 75 of the same Act. Stirling J. has held the Perry Almshouses to be an ecclesiastical charity, and that the parish council has no power to appoint new trustees of it. North J. has held Ross's Charity not to be an ecclesiastical charity, and that the parish council has power to appoint new trustees of it. Another question arises in *In re Ross' Charity*, in which the trustees are the churchwardens. It is contended that, even if that charity is not an ecclesiastical charity, s. 14 does not apply to it. No such question arises in the Perry Almshouses case, and it will be convenient to deal first with the important question raised in both appeals—namely, whether these charities are charities to which s. 14 is applicable.

Sect. 14 is one of a group of sections relating to parish meetings and parish councils, and more particularly to their powers and duties. So far as I can discover, their powers and duties extend to parochial charities which are not ecclesiastical, but they do not extend to ecclesiastical charities. These are excepted in every case in which general language is used which would otherwise include them and place them under the control of the new bodies created by the Act. Sect. 5, sub-s. 2 (*c*); s. 6, sub-s. 1 (*a*) i., (*c*) iii.; s. 14; s. 19, sub-s. 4, all shew that the above observation is well founded.

Sect. 75 does not define or profess to define the meaning of "ecclesiastical charity," but says that unless the context otherwise requires the expression ecclesiastical charity shall include various things, and (inter alia) a charity the endowment of which is held "for the benefit of any particular Church or denomination, or of any members thereof as such." The word "Church" here clearly does not mean building; it means a religious society of some sort. But to be an ecclesiastical charity its endowment need not be for all the members of a

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particular Church or denomination; it may be for the benefit of some of them only; but then the endowment must be for their benefit as such members.

The whole controversy turns on the meaning of these words "as such." They are obviously introduced to prevent the application of the term ecclesiastical charity to members of a particular Church or denomination irrespective of their membership. The words "as such" do not mean "only." Such an interpretation might defeat the object with which the words are introduced. The words "as such" mean as members—i.e., in their character of members. But, although the words "as such" do not mean "only," and a charity only for some members of a particular Church or denomination might not be an ecclesiastical charity, yet I cannot myself see how a charity for the benefit of some of the members of a particular Church or charity can be said to be for their benefit "as such" if, upon the true construction of the instrument constituting the charity, non-members of that Church or denomination are entitled to the benefit of the charity as well as members.

The solution of every case must be found in the true construction of the instrument of endowment; and, although I am not prepared to accede to the broad proposition contended for by Mr. Vaughan Hawkins—namely, that no pure eleemosynary charity can be an ecclesiastical charity—I think it may be safely said that no eleemosynary charity for the benefit of members of a particular Church or denomination is made an ecclesiastical charity by s. 75, unless the benefits of the charity are (upon the proper construction of the instrument founding it) confined to the members of that particular Church or denomination. If they are so confined, a further question will still remain, whether the benefit conferred upon them is conferred upon them as such members.

Ross' Charity is clearly not so confined. The preference to be given to those old and poor widows who were most constant in their attendance in church falls far short of shewing that only members of the Church of England were objects of the founder's bounty. North J. took this view; and I do not think it necessary to say more than that I entirely agree with him.

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The Perry Almshouse case is more difficult. No one can doubt that the founder there intended to benefit poor members of the Church of England. But are non-members excluded? For unless they are the charity cannot, in my opinion, be brought within the statute's definition of ecclesiastical charity. I have come to the conclusion that her intention to benefit members of the Church of England only is plain from the terms of her gift.

It is very forcibly urged by the appellants that the founder has not, in terms, made such membership a condition for participating in her charity. The appellants contend that such a condition cannot properly be inferred from the terms of her gift. It is urged that it is quite consistent with those terms that she did not intend to do more than require performance of the conditions which she expressly prescribed. The answer to this argument is that, although it may be true that some persons may conscientiously perform these conditions without being members of the Church of England, there is nothing to shew that the founder ever thought of them. She specified those conditions as the most obvious means of ascertaining who were such members. She took it for granted that poor persons conducting themselves as she required would be members of the Church of England; and a construction which would let in a succession of hypocrites is, in my opinion, clearly inadmissible. *Shore* v. *Wilson* (1) is very important on this point. If the deed is construed as contended for by the appellants, it will be impossible to exclude conforming hypocrites from the benefits of the charity; and this compels me to reject the construction.

I feel the force of the observation that, if the founder had been asked whether any further inquiries were to be made to ascertain whether persons conforming with her requirements were really members of the Church of England, she might have said "No," and might have been content with the test she imposed. It may be extremely difficult to determine whether a constant worshipper at church, who partakes of the Holy Communion and leads a godly, righteous, and sober life

(1) 9 Cl. & F. 355.

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to the glory of God's Holy Name, is or is not a member of the Church of England. Primâ facie he would be taken to be so, and the founder took the risk of non-members, whether conscientious or unconscientious, benefiting by her charity. But this is very different from saying that non-members are entitled so to benefit, if known to be non-members. I agree that the founder of this charity has so expressed herself as to render it unnecessary for the trustees to do more than ascertain that a person seeking the benefit of the charity has complied with the condition laid down. But for all that, her desire to confine her charity to members of the Church of England is, in my opinion, clear from the terms of the deed. The conditions imposed by her are imposed as the most obvious tests of membership, and the charity is for the benefit of the members of the Church of England as such. It is impossible on this deed to come to any other conclusion if I am right in the foregoing observations.

The argument that because she says the trustees are to be members of the Church of England, and she does not say that the poor are to be so, does not impress me. The conditions she has imposed are imposed to ensure that they shall be such members. Great reliance was placed by the appellants on *Attorney-General* v. *Calvert*. (1) The charity there was a Pre-Reformation charity, and the Court had to decide how the endowment should be applied under circumstances never contemplated by the founder, but arising out of the change in the national religion effected by the Reformation. The judgment must be read with reference to the case with which the Court had to deal. We have no such problem to solve. The case of *Attorney-General* v. *Calvert* (1) does not assist us in construing the deed of endowment before us, nor justify us in holding that mere performance of the conditions contained in it entitles a person not a member of the Church of England to the benefit of the charity founded by that deed. I therefore agree with Stirling J. in holding the Perry Almshouses to be an ecclesiastical charity.

It only remains to consider the question raised in *In re Ross' Charity* case as to the application of s. 14, sub-s. 2, to the

(1) 23 Beav. 248.

case of a non-ecclesiastical charity, the endowment of which is vested in churchwardens only. The section is, I think, tolerably plain. It has to be applied to the case of a non-ecclesiastical charity the endowment of which is vested in churchwardens as trustees. The appellants' contention makes it inapplicable to such a case. This cannot be right. Practically the simplest way of dealing with s. 14, sub-s. 2, is to leave the first part, which applies to overseers, to stand as it is; and then to repeat it, making it applicable to churchwardens and confining it to non-ecclesiastical charities. In this way the enactment will be made applicable as well to overseers and churchwardens: and this is what the Legislature obviously intended. Sect. 19, sub-s. 5, confirms this view. On this point also North J. was quite right. The appeal, therefore, in Ross' Charity and the appeal in Perry's Almshouses will be both dismissed. The costs will be paid as arranged.

CHITTY L.J. I am of the same opinion. As to the appeal in Ross' Charity, I think that the preference to be given to the old and poor widows who, not being disabled by infirmity or sickness, were most constant in their attendance on the public service of the church is not sufficient to make this charity an ecclesiastical charity within the Act of 1894. And as to the point raised on the same appeal, which turns principally on s. 14, sub-s. 2, of that Act, I think that the parish council has power to appoint trustees in the place of churchwardens, who are the only trustees of a non-ecclesiastical charity. On both these points North J. appears to me to have come to the right conclusion, and I have nothing to add to what has fallen from the Master of the Rolls in his judgment on the subject.

As to the appeal in Perry's Almshouses, the question turns upon the true construction of a deed of July, 1851, whereby the charity was founded. Is the charity thus constituted an ecclesiastical charity within the Act of 1894? The 75th section does not define an ecclesiastical charity, but contains a statement of what the term includes. Sub-s. 2 (*e*) includes as an ecclesiastical charity a charity the endowment whereof is

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held "for the benefit of any particular Church or denomination, or of any members thereof as such." I hold that this charity is for the benefit of members of the Church of England as such—that is, in their character of members or in virtue of their membership.

The language of the deed appears to me to be plain and unmistakable, and not open to any reasonable doubt; and the meaning is that the persons who take the benefit of the charity are to be members of the Church of England, and the charity is intended for them as such members exclusively. The persons to be selected for the almshouses are to be poor men and women of sound mind who have attained the age of sixty years, or are incapable of maintaining themselves wholly by manual labour, and also, having been born in the parish, have resided there for the last five years, or, having been born elsewhere, have resided in the parish for the last ten years. Thus far the charity is eleemosynary only. The founder then adds these further essential qualifications. First, attending divine service at the parish church. This attendance is not to be merely occasional, or even habitual: it is to be attendance on every Sunday for the last five years, except when prevented by sickness or other urgent cause. Secondly, the candidates must have been partakers of the Holy Communion—that is, in other words, partakers of the Sacrament of the Lord's Supper according to the rites of the Church of England as administered in the Service of the Holy Communion. The expression "partakers of the Holy Communion" is taken from the rubric at the head of that service in the Prayer Book of the Church of England. Thirdly, they must have led a godly, righteous, and sober life to the glory of God's Holy Name. This expression, again, is taken from the General Confession at Morning and Evening Prayer of the Prayer Book.

These three tests are all practical, and eminently so—indeed, as efficient as any that can be reasonably suggested for ascertaining whether a person is a member of the Church of England. If the question is asked, Is a person who complies with these tests, who attends the parish service every Sunday for five years, partakes of the Holy Communion, and leads the life

described, a member of the Church of England? it seems to me that the answer cannot be otherwise than in the affirmative. The third qualification necessarily excludes the argument which was pressed upon us for the appellants of mere conformity. A person who leads such a life must be honest and sincere and truthful as well in act and deed as in words.

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It is urged as a matter of history that in former times Dissenters have complied with such conditions as these here imposed; but no instance was cited. What Dissenters, and honest Dissenters, may have done in times past when they were placed under civil disabilities by laws, now acknowledged to be unjust and which they felt to be unjust, appears to me to be wholly irrelevant. By reason of the injustice of the law which they denounced, they may or may not have considered themselves justified in a mere outward conformity to the test imposed. It was further suggested that in 1851, when the civil disabilities had been removed, an honest Dissenter might conform to the tests prescribed. I am unable to accept this hypothetical suggestion. I think it is inadmissible. Certainly it is far-fetched and unpractical; it ought to have no weight in determining the question before us.

What this founder has said by her deed may, I think, be fairly stated thus: "I will not ask these poor and old or infirm persons to make or subscribe any declaration that they are members of the Church of England. To put upon them such an obligation would be futile. They would probably not be able to understand it." (I throw in parenthetically that the learned counsel for the appellants were unable to state with precision what constituted lay membership.) "Their poverty, their age, or infirmity might induce them to say that they were members with a view to obtain admission into my almshouses. I will do better than that. I will have them judged by a long, continuous course of action, by their conduct, and by their lives. If they do such things and are such persons as I require, they will necessarily and in a practical manner manifest that they adhere to the Church of England and are members of that Church. It is for them as such that I intend my charity."

The above are the main grounds on which my judgment is

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based. In regard to the requirement that the almsfolk shall have been partakers of the Holy Communion, it is worthy of mention that the Legislature by the Corporations Act, 1661 (13 Car. 2, st. 2, c. 1, s. 12) made the taking of the Sacrament of the Lord's Supper according to the rites of the Church of England the test of membership with that Church which it imposed on officers in municipal corporations.

There is a further point on which stress was laid by the appellants' counsel. By the deed the trustees of the charity are to be the rector of the parish for the time being (who is necessarily a member of the Church of England) and certain laymen members of the Church of England. In default of a vacancy in the lay trusteeship being filled up within a limited time, the rector has the power of filling up the vacancy. These provisions do not appear to me to displace the reasoning as to the effect of the trusts for the beneficiaries. The trustees would naturally be in a better position of life than the poor old folk who would seek admission into the almhouses, and the founder thought proper to require that the trustees should be members of the Church of England without imposing on them all the strict practical qualifications necessary for the candidates for admission into the almshouses. The power of selecting for the almshouses is thus confided to members of the Church of England. This circumstance as to the trustees' qualification does not impair the conclusion at which I have arrived—indeed, it would seem rather to strengthen than to weaken it.

In regard to *Attorney-General* v. *Calvert* (1), I have nothing to add beyond this—that there is nothing in that decision which precludes our construing this particular deed in the manner we have done. There is no rule of construction that stands in our way. Such rules may be, and often are, useful assistants, but they are not infallible guides.

An argument presented by Mr. Vaughan Hawkins requires notice. He said broadly that no eleemosynary charity can be "an ecclesiastical charity" within the Act of 1894. I do not agree. He attempted to read the words of s. 75, sub-s. 2 (*e*), as if "benefit of members of a particular Church or denomina-

(1) 23 Beav. 248.

tion as such" meant for the religious benefit or edification of the members as such. In my opinion there is no justification for thus qualifying the meaning of the ordinary word "benefit," which includes temporal as well as spiritual or religious benefit. He referred to a passage in Lord Macnaghten's speech in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), in which charity in its legal sense was spoken of as comprising four principal divisions—trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under the preceding heads. Lord Macnaghten was not there ranging charities into four distinct classes, each of which was exclusive of the others. It is plain that there may be a charity in the legal sense for purposes which are both eleemosynary and ecclesiastical or religious.

VAUGHAN WILLIAMS L.J. I have not the slightest doubt but that the charity in the Perry Almshouses is a charity for the benefit of members of the Church of England as such, and that the intention of the donor was to exclude from the benefit of the charity all who are not members of the Church of England. It follows that, even if the words of the 75th section, sub-s. 2, clause (*e*), must be read as meaning a charity for members of a particular Church or denomination exclusively, this charity is an ecclesiastical charity. As to Ross's Charity, I agree in the construction put by North J. and the other members of the Court upon this very difficult section; and I further think that, whether members of a particular Church or denomination does or does not mean members of such a Church exclusively, the preference given in this case to regular attendants at the church does not make the purpose of the charity the benefit of members of the church as such. I agree that the benefit is not limited to religious benefit to the exclusion of mere temporal benefit.

Solicitors: *Clabon; Tatham & Procter, for Abbot, Pope, Brown & Abbot, Bristol; J. N. Mason & Co., for Sworder & Longmore, Hertford.*

(1) [1891] A. C. 583.

W. W. K.

NORTH J.

1898

Nov. 5.

In re KUYPER'S POLICY TRUSTS.

[1898 K. 0115.]

Married Woman—Policy by Husband for Benefit of Wife—Petition for Appointment of Trustees—Title of Petition—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10.

A widow, whose husband died in 1898, petitioned for the appointment of trustees to receive payment of the money secured by a policy of assurance effected by him in 1874, under the Married Women's Property Act, 1870, and expressed to be for her benefit:—

Held, that the petition was properly entitled only in the matter of the Act of 1870.

In re Soutar's Policy Trust, (1884) 26 Ch. D. 236, not followed.

In re Adam's Policy Trusts, (1883) 23 Ch. D. 525; 48 L. T. 727, and the opinion expressed by Stirling J. in *In re Turnbull*, [1897] 2 Ch. 415, followed.

PETITION by a widow, whose husband died in 1898, for the appointment of trustees to receive payment of the money secured by a policy of insurance which the husband had in 1874 effected on his own life, under the provisions of the Married Women's Property Act, 1870. The policy was expressed to be for the benefit of the wife. The petition was entitled in the matter of the trusts of the policy, and in the matter of the Act of 1870.

K. G. Metcalfe, for the petitioner.

[NORTH J. Ought not the petition to be entitled also in the matter of the Married Women's Property Act, 1882?]

According to the latest authority that is not necessary. In *In re Turnbull* (1) Stirling J. expressed an opinion that such a petition under such circumstances should be entitled only in the matter of the Act of 1870, and I am informed by counsel that that learned judge has since acted upon his opinion by making an order upon a petition entitled only in the matter of the Act of 1870. In *In re Turnbull* (1) both *In re Adam's Policy Trusts* (2) and *In re Soutar's Policy Trust* (3) were

(1) [1897] 2 Ch. 415. (2) 23 Ch. D. 525; 48 L. T. 727.
(3) 26 Ch. D. 236.

cited to the learned judge, and he preferred the view taken by Chitty J. in the former case to that taken by Pearson J. in the latter case.

NORTH J. I will follow the opinions of Chitty J. and Stirling J. The petition need not be entitled under the Act of 1882. I make an order for the appointment of trustees.

Solicitors: *Gasquet & Metcalfe.*

W. L. C.

In re BENSON. ELLETSON *v.* PILLERS.

[1898 B. 4398.]

Practice—Payment into Court on Motion—Admission by Defendant—Proceeds of Sale of Trust Securities paid away by Defendant.

In answer to an interlocutory motion that the defendant should pay into court money which arose from the sale of shares of which he had been a trustee for the plaintiff, but which he alleged (though the plaintiff denied it) that the plaintiff had given to him, the defendant admitted that he had received the proceeds of sale, and had transferred the shares to the purchasers. But he deposed: "Before any question was raised as to the transfers I in good faith paid away and disposed of all the purchase-money, in the belief that I was entitled thereto, and no part thereof is now in my hands, and I have no power over the shares or any of them":—

Held, that it was not shewn that the purchase-money was not under the defendant's control, and that he must be ordered to pay the amount into court.

MOTION on behalf of the plaintiff (1.) for an injunction to restrain the defendant, until the trial of the action or until further order, from dealing with, except by delivering to the receiver thereinafter mentioned, 195 fully paid-up preference shares of 5*l.* each in the Fishponds and Bedminster Brick and Tile Company, Limited, 335 fully paid-up ordinary shares of 5*l.* each in the same company, and a debenture for 1000*l.* issued by the same company, or any one or more of such shares, or any other shares, debentures, or securities forming part of

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the estate of William Benson, deceased; (2.) that a receiver might be appointed to receive the rents and profits of the real and leasehold estates, and to collect and get in the outstanding personal estate, including the shares and debentures above mentioned, of the said William Benson; and that the defendant, one of the executors and trustees of the said William Benson, should deliver over to such receiver all securities in his hands for the said outstanding personal estate, and all certificates (including the certificates for the above-mentioned preference and ordinary shares respectively), warrants, bonds, &c., relating thereto; (3.) and that the defendant might be ordered, within four days after the service of the order to be made on the motion, to pay into court to the credit of the action the sum of 2025*l.*, being the amount received by him in respect of the sales of certain ordinary and preference shares in the said company, forming part of the residuary estate of the testator.

By the writ in the action the plaintiff claimed the relief stated in paragraphs 1 and 2 of the notice of motion, and also administration of the real and personal estate of William Benson.

The testator William Benson died on December 30, 1888. By his will, dated October 17, 1888, after making some specific bequests, he gave and devised all his real and personal estate unto and to the use of the plaintiff and the defendant, upon trust for sale and conversion and investment of the proceeds, and to pay the income thereof to the testator's wife for her life, and after her death upon certain trusts, under which, in the events which happened, the plaintiff became, subject to the life interest of the testator's widow, absolutely entitled to the whole of the trust funds. And the testator appointed the plaintiff and the defendant executors and trustees of his will. The defendant was a solicitor and acted as the plaintiff's solicitor, and also managed the trust estate.

The widow died on August 21, 1898.

The trust funds were in part invested in 995 fully paid 5*l.* preference shares, 535 fully paid 5*l.* ordinary shares, four debenture bonds for 1000*l.* each, three debenture bonds for 500*l.* each, and five debenture bonds for 100*l.* each of the above

company, which were respectively registered in the names of the plaintiff and the defendant.

On September 19, 1898, the plaintiff and the defendant executed six transfers, each of which was expressed to be made in consideration of 10*s.* paid by the transferee.

The first transfer was of 800 of the preference shares to the plaintiff.

The second transfer was of 200 of the ordinary shares to the plaintiff.

The third transfer was of three of the 1000*l.* debentures, the three 500*l.* debentures, and the five 100*l.* debentures to the plaintiff.

The fourth transfer was of the remaining 195 preference shares to the defendant.

The fifth transfer was of the remaining 335 ordinary shares to the defendant.

The sixth transfer was of the remaining debenture for 1000*l.* to the defendant.

The value of the shares and debentures transferred to the plaintiff was said to be 10,000*l.*; the value of those transferred to the defendant was said to be 3600*l.*

These transfers were registered in the company's books on September 26, 1898.

On September 30, 1898, the defendant executed the following transfers: (1.) a transfer of ninety-four of the preference shares which had been transferred to him to one Philip Triggs in consideration of 470*l.*; (2.) a transfer of 100 of the ordinary shares which had been transferred to him to Philip Triggs in consideration of 525*l.*; (3.) a transfer of four of the preference shares which had been transferred to him to Mrs. Saunders in consideration of 20*l.*; (4.) a transfer of ninety-seven of the preference shares which had been transferred to him to Stanley Smith and Emma Odgers Smith, widow, in consideration of 485*l.*; (5.) a transfer of 100 of the ordinary shares which had been transferred to him to the last-mentioned transferees in consideration of 525*l.*

The consideration moneys paid upon those five transfers amounted in the whole to 2025*l.*

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By his affidavit in support of the motion the plaintiff said that when he executed the six transfers the defendant told him that they were to pass the shares and debentures into his (the plaintiff's) name, and that he did not discover until afterwards that three of the transfers were made to the defendant himself, though the plaintiff did not intend to make any transfer to the defendant.

In answer to this affidavit the defendant said that the transfers to himself were made in pursuance of a prior arrangement between the plaintiff and himself that the defendant should receive a considerable amount by way of remuneration for his services in connection with the trusts of the testator's will, and that when the plaintiff executed the six transfers the defendant fully explained the matter to him, and stated that three of the transfers were to the plaintiff, and the other three to the defendant.

The defendant's affidavit contained the following paragraph: "I have sold all the said preference shares and 200 of the said ordinary shares transferred to me as aforesaid, and I have received the purchase-money for the same, and have transferred the shares so sold to the purchasers thereof. All this was done before any proceedings were commenced against me and before any intimation of such proceedings was given, and before I was aware of any objection to the said transfers. Before any question was raised as to the said transfers, I in good faith paid away and disposed of all the said purchase-money, in the belief that I was entitled thereto, and no part thereof is now in my hands, and I have no power over the said 195 preference shares and the 200 ordinary shares or any of them."

On the opening of the motion the defendant submitted to undertake not to deal with the remaining 135 ordinary shares and the 1000*l.* debenture until the trial of the action, and to hand over the rest of the testator's estate to the plaintiff, except a sum of 1000*l.* which was to be paid into court in the action to secure payment of the defendant's costs, charges, and expenses as trustee when they had been taxed.

The argument then proceeded with regard to the third claim made by the notice of motion.

Vernon Smith, Q.C., and *T. Ribton*, for the plaintiff. It is clear that the defendant had the shares in question, and that he has sold them and received the purchase-money. He cannot improve his position by selling the shares. In order successfully to resist this motion the defendant must satisfy the Court that the money has left his hands, and has been paid to a third person under some colour of right. *Neville* v. *Matthewman* (1) was not like the present case. *Nutter* v. *Holland* (2) is also distinguishable. In *Crompton & Evans' Union Bank* v. *Burton* (3) the defendant stated exactly what he had done with the money which had been in his hands.

Hon. E. C. Macnaghten, Q.C., and *Christopher James*, for the defendant. No sufficient ground has been shewn for ordering payment into court upon an interlocutory motion. The plaintiff is really attempting to obtain execution before judgment. The question to be tried is simply gift or no gift of the shares by the plaintiff to the defendant. It is not a case in which the defendant has a trust fund in his possession. The plaintiff is seeking to set aside a gift made by him to the defendant.

[NORTH J. If there was no gift, the money is trust money.]

If the shares had not originally been part of the testator's estate, it is clear that the plaintiff could not, in an action for a declaration that no gift had been made by him, obtain an order on motion for payment of the money into court. There is no admission by the defendant that he has trust money in his hands. The principles laid down in *Neville* v. *Matthewman* (1) apply. The defendant swears that he has paid the money away, and what he says is not consistent with his having paid the money to his own bankers. An order for payment of money into court on interlocutory motion must be based upon the defendant having trust money in his hands. In a case of a mere money demand, the Court would not order payment into court by the defendant before trial. Here the defendant denies the existence of a trust.

Vernon Smith, Q.C., in reply.

(1) [1894] 3 Ch. 345. (2) [1894] 3 Ch. 408.
(3) [1895] 2 Ch. 711.

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NORTH J. I have come to the conclusion that this sum of 2025*l.* ought to be brought into court. [His Lordship stated the effect of the will and the execution of the six transfers by the plaintiff, and continued:—]

The shares and debentures transferred on September 19 were beyond all question part of the trust estate derived from the testator, and the income of which had been paid to the tenant for life; the whole was, as every one must admit, trust estate immediately after the death of the tenant for life. Then, the plaintiff having received the transfers for 10,000*l.*, and the defendant being the transferee of the 3600*l.* worth of securities, the defendant claims to retain the latter as being his own property, upon the ground that, although down to that time they were beyond all question part of the trust estate, they were the subject of a present made to him by the plaintiff on that occasion. At this time the plaintiff was a country gentleman living in Yorkshire, and was one of the trustees of the will. The defendant was the other trustee, and he had the management of the trust. He is a solicitor, and he was the solicitor of the plaintiff. According to his own account, he claims this present from the plaintiff on the ground of services which he says he had rendered to the testator's estate several years previously—he says the transfers to himself were prepared in order to carry out and give effect to a present of 3600*l.* which the plaintiff had promised to make him. According to the plaintiff's account, when these transfers were produced to him no explanation was given by the defendant, but they were produced as being transfers by which it was intended to vest in the plaintiff the trust estate which had previously been vested in the trustees. That is clearly so to the extent of 10,000*l.*; but the defendant says there was a deliberate gift to him of the 3600*l.* No writing of any sort or kind is produced in support of this statement, except that the defendant is named in the transfers as the transferee. The plaintiff says that as soon as he became aware of what was claimed by the defendant he took proceedings to dispute his claim.

The defendant has made an affidavit in which he says that his story is correct, and that he is entitled to the property as a

gift from the plaintiff, and that it has ceased to be trust money. Of course, if it is clearly established that there was a gift to the defendant, and that the property was handed over deliberately and knowingly by the plaintiff to him under such circumstances that he as a solicitor is entitled to retain it, it did then cease to be trust property. But, unless that is clearly made out, it is impossible to say that it has ceased to be trust property. That is the question which will have to be decided at the trial of this action; and I shall no doubt have the opportunity at the trial of seeing the parties and hearing what they themselves say, and shall not have to rely only on affidavits on the one side and the other. At present it is absolutely impossible to say that the Court ought to be satisfied that the property has ceased to be trust property merely because the defendant says there was a gift to him. If that argument were sound, the 135 ordinary shares and the 1000*l.* debenture would equally not be trust property, and the Court would be absolutely without any power to retain or secure them. No doubt the defendant is willing that those shares and that debenture should be secured: he makes no difficulty about that. But the argument as to the proceeds of the shares which have been sold may be tested in that way. In my opinion it is a question which will have to be decided at the trial whether this property, which unquestionably was trust property at one time, has ceased to be trust property and become the sole property of the defendant. And, even if the defendant had opposed, I should have felt bound to secure the shares and debenture, and I should have had complete jurisdiction to do so.

Does it make any difference that some of the shares have been sold by the defendant and the purchase-money received by him? In my opinion it does not. If the shares are trust property, the proceeds of them received by the defendant are equally trust property. I cannot see any distinction between the shares themselves and the proceeds of sale received in respect of those shares which have been sold. If the shares themselves would have had to be secured until the trial, I think it equally follows that the money should be secured.

I have left out of consideration so far one point as to which

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there is a great difference between the money and the shares. [His Lordship read the above-quoted passage from the defendant's affidavit, and continued :—]

I note the difference between the way in which he deals with the shares and the proceeds of the shares. He says he has no power over the shares which he has sold; but he does not say he has no power over the purchase-money he has received. He says he has disposed of it in good faith, and that everything has been done in good faith, and that he is entitled to treat the money as his own. That is a serious question, which will have to be tried; and I cannot attach more weight to what he says about good faith in parting with the money than to what he says about good faith in parting with the shares. In other words, I cannot accept the defendant's statement as conclusive of the matter. Then he says he has "paid away and disposed of all the purchase-money, in the belief that I was entitled thereto, and no part thereof is now in my hands." But he does not say it is not in his power or under his control. He does not make that statement as to the money which he does make as to the shares themselves. I do not think his affidavit is sufficient to relieve him from the liability to pay the 2025*l.* into court, and I order him to do so within a month.

Solicitors: *Meredith, Roberts & Mills, for Perham & Son, Bristol; Indermaur & Brown, for Press, Inskip & Press, Bristol.*

W. L. C.

GOLDSTONE *v.* WILLIAMS, DEACON & CO.

STIRLING J.

1898

Aug. 5; *Oct.* 27.

[1897 G. 2456.]

Practice—Discovery—Production of Documents—Privilege.

In an action against G. and her trustee in bankruptcy for breaches of trust committed by her as administratrix of her deceased husband's estate, the plaintiffs' solicitors had prepared certain accounts which were produced to her on examination before an examiner, and admitted by her to be correct. The action was afterwards compromised, and the depositions of G. to which the accounts were exhibited were entered as read in the order of compromise. The accounts related to transactions between G. and a firm of bankers with whom she had (in alleged breach of trust) deposited securities belonging to her husband's estate to secure advances to herself. In another action by the same plaintiffs against the bank, the defendants claimed production (1.) of the accounts, and (2.) of the office copy of G.'s depositions, both of which were in the plaintiffs' possession:—

Held, that the accounts were privileged, but the copy depositions was not.

North Australian Territory Co. v. *Goldsborough, Mort & Co.*, [1893] 2 Ch. 381, followed.

THIS was a motion to discharge an order made in chambers on July 18, 1898, whereby it was ordered that the plaintiffs should produce to the defendants the evidence in their possession upon which the order for compromise of an action of *In re Goldstone*, *Goldstone* v. *Goldstone* [1897 G. 893], and dated November 13, 1897, was made, including the office copy depositions of the defendant Jane Goldstone and the exhibits relating thereto.

The plaintiffs, in the action of *Goldstone* v. *Goldstone* and in this action, were the infant children of Sampson Goldstone, who died in December, 1884, intestate, leaving the defendant Jane Goldstone his widow, who became his legal personal representative. After her husband's death she had deposited certain securities belonging to his estate with Messrs. Williams, Deacon & Co., a firm of bankers, at first for safe custody, but subsequently by way of security for advances made to her by the bank. The bank had realized their security and applied the proceeds in satisfaction of Mrs. Goldstone's debt to them.

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The action of *Goldstone* v. *Goldstone* was brought against Mrs. Goldstone and her trustee in bankruptcy, and by it the plaintiffs sought, first, to obtain administration of the intestate's estate, and, secondly, to trace certain property earmarked as belonging to the estate, and to establish the amount of the proof to be allowed. The usual administration order having been made, Mrs. Goldstone did not furnish proper accounts of her husband's estate, but made an affidavit stating what the estate consisted of at the time of his death. The plaintiffs' solicitors then employed an accountant to investigate the estate, with a view not only to the prosecution of that action, but also with a view to any further action which might become necessary; and the result of that investigation was embodied by the accountant in a statement of accounts. Mrs. Goldstone was afterwards examined in the action before an examiner, and in the course of her examination the statement of accounts was put to her and admitted by her to be correct, and was then made an exhibit to her depositions. After this admission the trustee in bankruptcy proposed a compromise; and, on the ex parte application of the plaintiffs, an order was made dated November 13, 1897, in which the depositions of Mrs. Goldstone and the exhibits thereto were entered as read.

On November 16 leave was given by the Court to the plaintiffs to bring the present action against the bank. It was alleged that the bank had notice that the securities deposited by Mrs. Goldstone formed part of the intestate's estate, and that a breach of trust had been committed by Mrs. Goldstone; and the plaintiffs claimed to recover against the bank accordingly.

By their defence the bank denied the case made by the plaintiffs, and also pleaded as follows (paragraph 15): "On or about the 10th March, 1897, Jane Goldstone was adjudicated bankrupt and thereupon an action was commenced by the plaintiffs against the trustee in bankruptcy of her estate claiming certain assets in the possession of the trustee as in fact forming part of the estate of Sampson Goldstone. The said action was compromised by a payment to the plaintiffs of 1700*l.*, which it was agreed should be accepted in full discharge, not only of the claim to the said specific assets, but of all

claims or right of proof on the part of the plaintiffs against Jane Goldstone's estate arising from breaches of trust by Jane Goldstone in the administration of Sampson Goldstone's estate. The bank will rely upon the said compromise as a defence and bar to this action."

Upon the usual order for discovery being made in this action, the plaintiffs' solicitor made an affidavit objecting to produce certain documents on the ground that they were privileged. These documents included "accounts prepared by an accountant relating to transactions between defendant Jane Goldstone and defendant bank and relating to the estate of Sampson Goldstone deceased and office copy depositions of Jane Goldstone."

On July 18, 1898, an order was made in chambers directing the production of the documents in question; and the plaintiffs now moved to discharge that order.

Jenkins, *Q.C.*, and *J. Rutherford*, for the applicants. The documents directed to be produced by the order of July 18 are privileged.

(1.) As to the accounts. They were prepared by the accountant upon the instructions of the plaintiffs' solicitors, and form the ground of the whole case against the bank. They were prepared with a view to this action as well as the former action against the trustee in bankruptcy. It is suggested, however, that although the accounts may have been originally privileged, yet that the privilege was destroyed by their being produced to Mrs. Goldstone on her cross-examination, and being made exhibits to her depositions. But a partial waiver of privilege is not waiver to all the world. Although the disclosure of a privileged document to an adversary may destroy the privilege to a certain extent, it does not necessarily destroy it altogether, and the mere putting of a privileged document into the hands of a person who is being privately examined does not destroy the privilege: *Reg.* v. *Hankins* (1); Bray on Discovery, pp. 366, 432, 440.

(2.) As to the copy of the depositions. We submit that it is

(1) (1849) 2 Car. & K. 823.

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privileged also. These depositions are not copies of evidence taken in open court. In *Learoyd* v. *Halifax Joint Stock Banking Co.* (1) the transcript of a shorthand writer's notes of proceedings at the examination of witnesses under s. 27 of the Bankruptcy Act, 1883, was held to be privileged in an action subsequently brought by the trustee in bankruptcy. Even depositions on the file of the court are private to this extent—that no one can inspect them except he can shew to the official in charge of them that he has proper grounds for so doing. The copy of the depositions which is in the plaintiffs' possession is not a transcript of evidence taken in open court, and is not therefore publici juris: *Nordon* v. *Defries.* (2)

Upjohn, Q.C., and *Kirby*, for the defendants. (1.) As to the accountant's report, what is ordered to be produced is the evidence read into the order of compromise. Mrs. Goldstone, upon its being put to her in cross-examination, accepted it as correct—whereupon it assumed a different character. It became a document common to all the parties, and was made evidence for all purposes. It cannot be brought under any head of privilege.

(2.) As to the copy depositions. There is no distinction between evidence taken in open court and that taken before an official of the court to whom the duty of taking the evidence is delegated. The phrase publici juris is misleading. Here it negatives the idea that there is anything confidential in the communication.

Shorthand notes of proceedings in open court are clearly not privileged: *Nicholl* v. *Jones* (3); *Rawstone* v. *Preston Corporation* (4); *In re Worswick.* (5)

There can be nothing privileged or confidential in what takes place in open Court.

Reg. v. *Hankins* (6) turned upon a very technical ground of privilege, namely, that production might incriminate the prisoner.

Jenkins, Q.C., in reply. The depositions are not publici

(1) [1893] 1 Ch. 686.
(2) (1882) 8 Q. B. D. 508.
(3) (1865) 2 H. & M. 588.
(4) (1885) 30 Ch. D. 116.
(5) (1888) 38 Ch. D. 370.
(6) 2 Car. & K. 823.

juris, and the plaintiffs are entitled to claim privilege for their copy. No doubt if the depositions could be inspected by any one as of course, then the copy which the plaintiffs have in their possession would not be privileged; but this case is very like *The Palermo* (1), where copies of depositions taken by the Receiver of Wreck under s. 432 of the Merchant Shipping Act, 1854, were held to be privileged: see also *Lyell* v. *Kennedy*. (2)

As to the accountant's report, the case is even stronger. In its inception the report is privileged, and nothing has been done to destroy or take away that privilege. It is not lost by the production of the accounts to the witness, or by their having been before the judge upon the making of the order of compromise. No authority can be found for the proposition that, because a privileged document is referred to in the course of proceedings not open to the public, the privilege is thereby destroyed.

Cur. adv. vult.

1898. Oct. 27. STIRLING J. (after stating the facts):—The question is whether the plaintiffs are entitled to object to produce (1.) the accounts and (2.) the copies in their possession of the depositions of Mrs. Goldstone.

The first of these questions is by far the more important, and is one of some nicety. The ground on which production is resisted on behalf of the plaintiffs is that the documents are privileged. It must be taken that the accounts were in the first instance privileged, for they were prepared at the instance of the plaintiffs' professional adviser with a view to a former litigation after that litigation had been commenced. That alone would be sufficient to confer privilege even if they had not been prepared also with a view to the present litigation. On this *Walsham* v. *Stainton* (3) is a direct authority. It has also been held that, as a general rule, a document once privileged is always privileged: see *Bullock & Co.* v. *Corry & Co.* (4), *Pearce* v. *Foster* (5), and the very recent case of *Calcraft* v.

(1) (1883) 9 P. D. 6.
(2) (1883) 23 Ch. D. 387; 9 App. Cas. 81.
(3) (1863) 2 H. & M. 1.
(4) (1878) 3 Q. B. D. 356.
(5) (1885) 15 Q. B. D. 114.

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Guest (1), where the Master of the Rolls makes these remarks: "I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived, but that the mere fact that documents used in a previous litigation are held and have not been destroyed does not amount to a waiver of the privilege."

These decisions appear to be based on the necessity of allowing full and free communication for the purposes of litigation, not only between a solicitor and his client, but between the solicitor and persons whose assistance he requires, or with whom he communicates in order to enable him properly to conduct the litigation. But there is another line of decisions under which it is sought to bring the present case. It has been decided that notes of proceedings in open court—*Nicholl* v. *Jones* (2); *In re Worswick* (3)—or before an arbitrator—*Rawstone* v. *Preston Corporation* (4)—are, as a rule, not privileged, but must be produced. Those decisions proceed on the ground, as I understand them, that the administration of justice in this country is a matter of public interest, and to be conducted (again as a general rule) in public, and, consequently, that there can be nothing privileged or confidential which passes in open court. If, then, the proceedings in the former action had taken place in open court, and if the plaintiffs had in their possession a shorthand writer's note of them, it would seem to me that such a note must be produced. That, however, does not completely answer the question with which I have to deal. Such a note would only shew that a particular document had been placed in the witness's hands and had been admitted to be correct. The document itself is only made an exhibit, and, consequently, is not on the file at all. The contents of the document did not get on the examiner's notes. Beyond this no use was ever made of the document in the former action, except that it was read in the order of November 13, 1897. That was an ex parte order made in chambers, and the document was obviously brought before the judge to enable him to determine whether the compromise was proper

(1) [1898] 1 Q. B. 759, 761.
(2) 2 H. & M. 588.
(3) 38 Ch. D. 370.
(4) 30 Ch. D. 116.

to be approved on behalf of the infants. Such use was not a public disclosure, but was in its nature confidential, and cannot affect the question which I have to decide. It seems to me that the case stands very much in the same position as if on a trial in open court after a document had been placed in a witness's hands, and its contents had been admitted to be true, but before it had been read, a compromise had been arranged between counsel. It appears to me that the document in question was never effectually made public, and that the use made of it does not amount to a waiver of the privilege. The particular point does not seem to be covered by authority; but the case which comes nearest to it is *North Australian Territory Co.* v. *Goldsborough, Mort & Co.* (1) There an action was brought by a company in liquidation. In the course of the winding-up, and after the commencement of the action, some of the directors and officers of the company were examined under s. 115 of the Companies Act, 1862, and their depositions duly taken. These depositions had not been filed. In the action, upon the cross-examination, under commission on behalf of the plaintiffs, of one of the persons examined under s. 115, he was questioned as to certain answers given by himself and other persons who had been examined under s. 115, and those answers were read to him from the depositions and admitted to be correct. Of course, so much as was read of these depositions got on the notes, and the application there was for the production of the rest of the documents. The present Master of the Rolls says (2): "The argument on behalf of the defendants practically comes to this: that because use was made of these depositions by the plaintiffs' counsel in Melbourne, the defendants are entitled to see them. On what principle are they so entitled? It is said that they are entitled because these depositions ought to have been scheduled in the plaintiffs' affidavit of documents as documents in their possession relating to matters in dispute in the action; but, if they had been scheduled, privilege would as a matter of course have been claimed for them, and the defendants would never have seen them; and it would not be fair to the plaintiffs if we were to treat these depositions

(1) [1893] 2 Ch. 381. (2) [1893] 2 Ch. 387.

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There remains the question as to the copies of the depositions—a much smaller question, and one which, but for the existence of the other, would probably not have been brought before me. These copies of the depositions simply constitute a note of what took place before the officer of the court in the course of a hostile litigation. The depositions are on the file of the court, and may be inspected by any person who shews that he has proper grounds for so doing: see Central Office Practice Rules (Annual Practice, 1897, p. 1229). On such an occasion I take it that no question as to privilege could be raised, any more than in the analogous case of documents filed in lunacy, as to which see *In re Strachan*. (1) It seems to me that the depositions have been filed in the usual way, and have become publici juris within the meaning of the decisions in *Nicholl* v. *Jones* (2) and the cases which have followed it, and that they are liable to production accordingly. Some reliance was placed on *The Palermo* (3); but there the depositions, of which copies were sought, were not publici juris. I think, therefore, that the order ought to be discharged only so far as it directs the production of the accounts. In this way effect is given to both lines of decision. That which has become public is to be produced, while that which has not, and is in its original nature privileged, is to be treated as remaining privileged. The costs of the present application will be costs in the action.

Solicitors: *F. Venn & Co., for J. C. Parkinson, Liverpool; Rooke & Sons, for Orford & Sons, Manchester.*

(1) [1895] 1 Ch. 439. (2) 2 H. & M. 588.
(3) 9 P. D. 6.

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STIRLING J.

1898

Nov. 4.

[1898 O. 978.]

Practice—Parties—Joinder of Plaintiffs—Joint and Separate Causes of Action —Rules of Supreme Court, Order XVI., r. 1.

The plaintiffs, the two Universities of Oxford and Cambridge, claimed an injunction to restrain the defendants, who were publishers of educational and other works, from publishing and selling books or publications bearing the titles "The Oxford and Cambridge Publications" or "The Oxford and Cambridge Edition," and from using the words "Oxford and Cambridge," so as to lead to the belief that the publications of the defendants were publications of the Universities or of either of them, or issued from the University Presses. The defendants had published a series of books bearing the titles complained of by the plaintiffs:—

Held, that the action arose out of the same series of transactions; that common questions of fact would arise, namely, the fact of publication and the fact that a belief would be induced that the publications of the defendants were those of the plaintiffs; that, therefore, the conditions mentioned in *Stroud* v. *Lawson*, [1898] 2 Q. B. 44, as being necessary to bring a case within Order XVI., r. 1, were fulfilled; and that consequently the plaintiffs were entitled to join in one action.

THIS was a motion on behalf of the defendants that all claims by the plaintiffs in the statement of claim in the above-mentioned action to any relief in respect of any separate cause of action in either of the plaintiffs, and all allegations in such statement of claim in support of any such separate cause of action, might be struck out, and that the action and the proceedings therein might be confined to the alleged joint cause of action, of the plaintiffs, and that the statement of claim might be amended accordingly; or, in the alternative, that the plaintiffs might be put to their election whether they would proceed with their alleged joint cause of action, or with the alleged separate cause of action of one of the plaintiffs, and that so much of the statement of claim as applied to any joint cause of action, or to any cause of action by the other plaintiff, might be struck out, and the statement of claim amended accordingly.

The action was brought by the two Universities of Oxford

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and Cambridge against the defendants, who were publishers of educational and other works, for an injunction to restrain the defendants, their servants and agents, from selling, advertising, or offering for sale any books or publications as being or bearing the title "The Oxford and Cambridge Publications" or "The Oxford and Cambridge Edition," and from using the names "Oxford and Cambridge," or of either of such names, upon or in connection with the books or publications or advertisements of the defendants in such manner as to induce the belief that the books or publications of the defendants were publications of the Universities of Oxford and Cambridge, or either of them, or emanated from the presses of or were authorized by the said Universities, or either of them.

The material paragraphs of the statement of claim were as follows:—

"(1.) The plaintiffs carry on an extensive and profitable business in printing and publishing, and their respective presses, known as the Oxford University Press and the Cambridge University Press, and the works emanating from their respective presses, have a world-wide reputation."

"(4.) There are certain works, including the Revised Version of the Bible, which are joint publications of the Oxford and Cambridge University Presses."

"(6.) During the year 1897 it came to the notice of the plaintiffs that the defendants had begun to publish text-books under the title of 'The Oxford and Cambridge Press,' and were advertising the same under that title in the *Journal of Education* and the *Educational Times*; and further, that the defendants were using the arms of the two Universities, or devices resembling those arms, in their advertisements and on the covers of their books.

"(7.) The plaintiffs objected to the use of the aforesaid title and of the arms of the Universities by the defendants as aforesaid; and after some correspondence between the parties, and as the defendants would not desist from the wrongful acts complained of by the plaintiffs as aforesaid, an action was commenced by the plaintiffs against the defendants on March 10, 1898, the short title of which is, '*Universities of Oxford and*

Cambridge v. *George Gill & Sons* [1898 O. No. 397],' claiming an injunction and other relief. And by an order dated May 3, 1898, on motion by the plaintiffs for an interlocutory injunction, it was by consent ordered that the defendants, their servants and agents, should be perpetually restrained from selling, advertising, or offering for sale any books or publications bearing the title of 'The Oxford and Cambridge Press,' or 'The Oxford Press,' or 'The Cambridge Press,' or the arms of the Universities of Oxford or Cambridge, or either of the said Universities, or from inserting in advertisements any reference to the Oxford and Cambridge Press or Presses, or either of them, or the arms of the said Universities, or either of them, which might induce the belief that the books or publications of the defendants were publications of the Universities of Oxford or Cambridge, or either of them, or emanated from the presses of the said Universities, or either of them; but the said order was not to preclude the defendants from selling any bound books then in stock with the University arms thereon not infringing that part of the injunction which related to the use of the title 'The Oxford and Cambridge Press,' or 'The Oxford Press,' or 'The Cambridge Press.'

"(8.) Subsequently to the date of the said order it was brought to the notice of the plaintiffs that the defendants had commenced to advertise their publications as 'The Oxford and Cambridge Publications,' and had also commenced selling their works with the title 'The Oxford and Cambridge Edition' thereon, and were using the words 'The Oxford and Cambridge' in connection with the defendants' Biblical and other publications.

"(9.) The use by the defendants of the titles 'The Oxford and Cambridge Publications' and 'The Oxford and Cambridge Edition,' and of the words 'The Oxford and Cambridge,' in connection with the defendants' Biblical and other publications, is calculated to deceive and to induce the belief that the books or publications of the defendants are publications of the Universities of Oxford and Cambridge, or emanate from the presses of the said Universities, or are authorized by the said Universities as text-books."

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"(11.) The titles adopted by the defendants, as mentioned in paragraph 8 hereof, are calculated seriously to injure the plaintiffs in the sale of educational and Biblical works emanating from their respective presses."

Moulton, *Q.C.*, and *A. àB. Terrell*, for the defendants. The plaintiffs cannot sue together. Their joint claim ought to be struck out. Two separate causes of action vested in distinct persons cannot be joined: Order XVI., r. 1; Order XVIII., r. 1. There is no joint trading by the plaintiffs. *Smurthwaite* v. *Hannay* (1) was an action by a number of shippers and consignees of goods under various bills of lading against the shipowners for short delivery. The House of Lords held that the causes of action were separate and distinct, and could not be joined in one action. Here the causes of action of the two Universities are separate and distinct, and there is no joint damage and no joint cause of action. The use of the word "Cambridge" by the defendants does not affect Oxford; and vice versâ.

[STIRLING J. The object of the alteration of the rule was to meet such cases as *Smurthwaite* v. *Hannay*. (1)]

See also *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* (2) and *Sadler* v. *Great Western Ry. Co.* (3) These cases were decided before the alteration of Order XVI., r. 1. *Stroud* v. *Lawson* (4) has been decided since the amendment, and it is clear from that case that the rule is subject to certain limitations, namely, that the right to relief must arise from the same transaction, and that there must be a common question of law or fact. Those conditions are not fulfilled in this case.

The real question is as to the right to use the words "Oxford and Cambridge," and not as to whether a certain book has been published. Publication is only an incident in the case. If the plaintiffs were a firm, there might on the face of the pleadings be a good cause of action; but they are not partners, and have no joint business which is injured by the acts of the defendants. They are not entitled to any injunction: *Clark* v.

(1) [1894] A. C. 494.
(2) [1895] A. C. 661.
(3) [1896] A. C. 450.
(4) [1898] 2 Q. B. 44.

Freeman. (1) But assuming we are wrong as to that, the action ought to be confined to one of the causes of action on the ground that they cannot be conveniently disposed of together: Order XVIII., r. 8.

Jenkins, *Q.C.*, and *Ingpen*, for the respondents, were not called upon.

[*Drincqbier* v. *Wood* (2) was also referred to.]

STIRLING J. (after stating the facts) :—It is said that an action in this form really contains a combination of claims—first, by the two Universities in respect of a joint interest; secondly, separate actions by each of them in respect of their separate interests; and it is said that according to the rules such an action cannot be brought. Whatever might have been said prior to the modification of Order XVI., r. 1, which was introduced in the year 1896, it seems to me that what I have to deal with is the existing rule, and not the rule as it existed prior to the alteration. I only call attention to the former rule to shew the great modification which has been introduced into it. [His Lordship then read the old rule and continued :—]

The existing rule is in widely different terms: "All persons may be joined in one action as plaintiffs, in whom any right to relief"—not the right to any relief, but "any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise." That rule has been commented upon and explained by the Court of Appeal in the case of *Stroud* v. *Lawson*. (3) Chitty L.J., whose judgment I refer to as stating the effect of the rule, says: "That rule in its present form was framed with reference to the difficulty which arose in the cases of *Smurthwaite* v. *Hannay* (4) and *Carter* v. *Rigby & Co.* (5) It is obvious on the face of the rule that it was not thereby intended to allow any number of

(1) (1848) 11 Beav. 112.
(2) W. N. (1898) 151 (13).
(3) [1898] 2 Q. B. 44, 51.
(4) [1894] A. C. 494.
(5) [1896] 2 Q. B. 113.

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different plaintiffs to join in one action any number of separate and different causes of action, but that it was intended merely to effect a modification of the old rule by which a limited liberty of joining plaintiffs with separate causes of action should be conferred." Therefore, there is to be a limited liberty of joining plaintiffs with separate causes of action—"The nature of the limitation is plain upon the face of the rule." Then his Lordship read it, and then he says: "It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law in order that the case may be within the rule." It was held by the Court of Appeal that the rule did not apply to the case under consideration. A little further on Chitty L.J. says: "It is not necessary for the present purpose to say to what cases the rule would apply. But I mentioned during the argument by way of illustration a case where persons having separate inheritances in a graveyard had separate rights of action in respect of disturbance of graves therein by one common act." That is the illustration of his Lordship. Now, according to the interpretation put upon the rule by the Court of Appeal (and, indeed, it seems plain upon the face of the rule itself), there are two conditions to be satisfied: first, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction; and, secondly, that there should be a common question of fact or law. Are these conditions satisfied in the present case? First, do they arise out of the same transaction or series of transactions? The action arises out of the publication by the defendants of a series of books bearing the title "The Oxford and Cambridge Publications" or "The Oxford and Cambridge Edition," and otherwise bearing the name "Oxford and Cambridge." It seems to me clear that the action arises out of one transaction, or at any rate a series of transactions, if each publication is to be treated as a separate transaction.

Then comes the question, Does the statement of claim shew that any common question of law or fact would arise in this

case? In the first place, the statement of claim alleges the fact of publication. No defence has yet been put in, and it does not appear upon the pleadings as they stand how far that fact will be admitted.

It is said that upon the hearing of the motion the fact of publication was not denied, and that as to that no common question of fact would arise. But is the pleader in framing his action to take upon himself to judge as to what the defendant is going to do in the way of admission in the prosecution of an action? Can that be the meaning of the rule? That would make the rule very difficult to work. What the rule says is, "where if such persons brought separate actions any common question of law or fact would arise." The publication of these books is the common fact which will have to be proved by the plaintiffs in order to establish this case. But there is more than that. What is the case made by the plaintiffs' pleader in paragraph 9? It is "the use by the defendants of the titles 'The Oxford and Cambridge Publications' and 'The Oxford and Cambridge Edition,' and of the words 'The Oxford and Cambridge' in connection with defendants' Biblical and other publications is calculated to deceive and to induce the belief that the books or publications of the defendants are publications of the Universities of Oxford and Cambridge, or emanate from the presses of the said Universities"—that means from both—"or are authorized by the said Universities as text-books"—that is by both. Therefore, what the plaintiffs take upon themselves according to this statement of claim to prove is—that the belief which is induced in the public is, not that it is published by Oxford and Cambridge separately, but by Oxford and Cambridge Universities together. That is one of the paragraphs which I should anticipate that the defendants will join issue upon. The evidence which goes to prove the effect upon the public of that statement will be common to both cases. It seems to me that there is manifestly in this case a common question of fact which will have to be decided.

In my judgment, this case is brought within the terms of the rule; and I must say, after all the argument I have heard, that it would be lamentable if, the rule having been amended, this

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case was not brought within it; for it appears to me to be one of the class for which the amendment was intended to provide. The rule has been amended in the way pointed out by Bowen L.J. as the means of bringing about the result which was sought to be attained in *Smurthwaite* v. *Hannay* (1), and I think that the draftsman has attained what I doubt not was his object.

Then another question is raised. It is said that, if this be so, I ought to exercise the power conferred upon me by Order XVIII., r. 8, which is this: "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together."

It is said that the causes of action, namely, the case of injury to the plaintiffs jointly and the case of injury to the plaintiffs separately, cannot be conveniently tried together. Now, it seems to me that the nature of the case is such as to shew that it is most convenient that these different causes of action should be disposed of together, and I think that that application fails just as much as does the other.

Solicitors: *T. Lamartine Yates; Freshfields & Williams.*

(1) [1894] A. C. 494.

G. A. S.

STIRLING J.

1898

Oct. 26; Nov. 5.

In re NOURSE. HAMPTON *v.* NOURSE.

[1897 N. 961.]

Will—Condition—Restraint of Marriage—Marriage with Consent—Alternative Bequests.

A testator by his will bequeathed to his son out of personal estate an annuity of 2000*l.*, and, in the event of his marriage, an additional annuity of 1000*l.*; and by a codicil he directed that the additional annuity should be payable only if the son should have married with the previous consent in writing of the trustees of the will:—

Held, that, as the testator had provided for the son in any event, the condition as to the consent was not in terrorem and was valid.

The principle of *Gillet* v. *Wray*, (1715) 1 P. Wms. 284, applied.

Reynish v. *Martin*, (1746) 3 Atk. 330, distinguished.

James Nourse by his will dated September 29, 1894, after appointing the plaintiffs executors and trustees thereof, and bequeathing certain legacies and annuities, devised and bequeathed all the residue of his real and personal estate to the plaintiffs upon trust for conversion, and out of the moneys to arise therefrom to pay his testamentary expenses and debts and legacies, and duty thereon, and to invest the remainder of such moneys, and out of the income arising therefrom to pay the annuities thereinbefore bequeathed, and the will then proceeded as follows: "And subject thereto" (the trustees) "shall out of such income if and so far as sufficient therefor pay to my son Harry James Duncan Nourse during his life an annuity of 2000*l.* and if he shall marry or shall have married either in my lifetime or after my death an additional annuity of 1000*l.*' payable as therein mentioned. "And if my said son shall die either in my lifetime or after my decease leaving a widow shall out of the income if and so as sufficient therefor pay to such widow during her life for her separate use without power of anticipation an annuity of 1000*l.*" payable as therein mentioned. The testator then directed that his trustees should during the period of twenty-one years from the testator's decease, if his son and his widow should so long live, accumulate the surplus income at compound interest, and at

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the expiration of such period, and thenceforth during the lives of his son and widow (if any), should divide the surplus income amongst the daughters and grand-daughters of certain named cousins, and subject thereto the trust premises were to be held in trust for the children of the testator's said son as therein mentioned, and subject to such trusts and powers in trust for the daughters and grand-daughters of the testator's said cousins.

By a codicil dated May 30, 1895, the testator provided as follows: "I direct that the annuity of 1000*l.* by my said will bequeathed to my son H. J. D. Nourse in the event of his marrying shall be payable to him only if he shall have married in my lifetime with my previous consent in writing or after my death with the previous consent in writing of the trustees for the time being of my said will. And I further direct that the annuity of 1000*l.* by my said will bequeathed to any widow whom my said son may leave shall be payable to her only if her marriage with my said son shall have taken place in my lifetime with my previous consent in writing or after my death with the previous consent in writing of the trustees for the time being of my said will and in all other respects I confirm my said will."

The testator died on April 4, 1897. At the time of his death he had no real estate.

On May 20, 1898, the testator's son, H. J. D. Nourse, being unmarried, took out this summons in the administration of the testator's estate for a declaration that the directions contained in the codicil with regard to the additional annuity to the son and the annuity to the widow were inoperative; but at the hearing the Court was not asked to make any declaration as to the widow's annuity.

Jenkins, Q.C., and *A. F. Peterson*, for the applicant. The question is whether the annuity of 1000*l.* given by the testator to his son, in the event of his marriage with the consent of the trustees of the will, will take effect on his marriage without their consent. It is submitted, in the first place that, reading the will and codicil together, that part of the condition which

requires the consent of the trustees is a condition subsequent; but, for the purpose of the question at issue, it is immaterial whether it is a condition subsequent or a condition precedent. The doctrine of disregarding these conditions as to consent, as being in terrorem only, was taken by the Ecclesiastical Court from the civil law, and is limited to personal estate. It is established by a series of cases that a condition of marrying with consent in the case of a gift of personal estate is, in the absence of a gift over, inoperative qua the consent, though, if there is a gift over, it is effectual: *Semphill* v. *Bayly* (1); *Reves* v. *Herne* (2); *Reynish* v. *Martin.* (3) In *Reynish* v. *Martin* (3) it was expressly decided by Lord Hardwicke that this doctrine of in terrorem applied to a condition precedent. That case has never been questioned, and it has been recognised in Jarman on Wills, 5th ed. vol. ii. 889, and Theobald on Wills, 4th ed. 501; and see *Reves* v. *Herne* (2), *Elton* v. *Elton* (4), and *Gray* v. *Gray.* (5) On the other hand, it is essential that the legatee should marry in order to become entitled to the legacy: *Garbut* v. *Hilton* (6); *Atkins* v. *Hiccocks* (7); *Elton* v. *Elton.* (4)

In *Creagh* v. *Wilson* (8) and *Gillet* v. *Wray* (9) a condition requiring the consent of trustees to a marriage was held valid; but those cases appear to be explicable by the fact that there was an alternative gift to take effect upon marriage without the consent: see note to *Harvey* v. *Aston* (10); Jarman on Wills, 5th ed. vol. ii. 888; and Theobald on Wills, 4th ed. 500; and, unless distinguishable from *Reynish* v. *Martin* (3) on that ground, they must be taken to be overruled by it. It has also been held that a condition requiring consent is good where there is a limitation as to the age of marrying: *Stackpole* v. *Beaumont* (11); *Younge* v. *Furse.* (12) Here there is nothing to take the case out of *Reynish* v. *Martin.* (3)

(1) (1721) Pr. Ch. 562.
(2) (1730) 5 Vin. Abr. 343 (Tit. "Condition" (Z. d.), pl. 41).
(3) 3 Atk. 330.
(4) (1747) 3 Atk. 504.
(5) (1889) 23 L. R. Ir. 399.
(6) (1739) 1 Atk. 381.
(7) (1737) 1 Atk. 500.
(8) (1706) 2 Vern. 572; 1 Eq. C. Ab. 111.
(9) 1 P. Wms. 284.
(10) (1737) 1 Atk. 361, 381.
(11) (1796) 3 Ves. 89.
(12) (1857) 8 D. M. & G. 756.

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Upjohn, Q.C., and *Whinney*, for residuary legatees. This condition is a condition precedent, and is a valid condition. The question is whether this case falls under any general rule such as has been contended for. In *Harvey* v. *Aston* (1) Willes C.J. doubted whether there was any general rule that a condition requiring consent to a marriage was in terrorem only unless there were words of limitation over, except for the purpose of construing the testator's intention. In *Stackpole* v. *Beaumont* (2) Lord Loughborough says "it is impossible to reconcile the authorities, or range them under one sensible, plain, general rule," and he severely criticises the supposed rule of the Ecclesiastical Court. In *Scott* v. *Tyler* (3) Lord Thurlow doubts how far the rule extends, and points out a number of limitations to its operation. The result of these decisions is that the rule is so eaten up with exceptions that the matter is almost at large. It is submitted that this case is excepted from the general rule, either on the ground that there are here alternative provisions, or on the ground that there is a gift over.

As to the first ground, in *Creagh* v. *Wilson* (4) the Lord Keeper took a different view of the law from that adopted by Lord Hardwicke. *Gillet* v. *Wray* (5) is nearer to this case. There there was a gift of a sum by will in any event, and a gift by codicil of a larger sum in lieu of the smaller sum on marriage with consent. Here the gift by will is followed by an additional gift in the event of marriage with consent. There is no difference in principle between the two cases. In *Holmes* v. *Lysaght* (6) there was an additional gift, as here, upon marriage with consent, and it was held that the testator's intentions must be complied with; the case was, however, compromised on appeal.

Gillet v. *Wray* (5) and *Holmes* v. *Lysaght* (6) provide a door of escape from this arbitrary rule.

As to the second ground, there is here a gift of income and a trust to accumulate out of surplus income; and it is submitted

(1) 1 Atk. 361, 377.
(2) 3 Ves. 89, 95.
(3) (1787) 1 W. & T. 7th ed. 535.
(4) 2 Vern. 572; 1 Eq. C. Ab. 111.
(5) 1 P. Wms. 284.
(6) (1733) 2 Bro. P. C. 261, Toml. ed.

that that is sufficient to bring this case within the exception as to gifts over. It has been held that a direction that the legacy should fall into residue is a sufficient gift over within this exception: *Lloyd* v. *Branton.* (1)

P. S. Stokes, for other parties in the same interest. *Reynish* v. *Martin* (2) is distinguishable from the present case, because there the legatee was not provided for in the event of her marrying without consent.

Butcher, Q.C., and *Warlters Horne*, for the trustees.

Jenkins, Q.C., in reply. Here there is no alternative gift and no gift over. In the report of *Creagh* v. *Wilson* (3) in Equity Cases Abridged a query is raised whether there was any gift over in that case. *Hicks* v. *Pendarvis* (4) is in direct conflict with *Creagh* v. *Wilson* (3), *Gillet* v. *Wray* (5), and *Holmes* v. *Lysaght.* (6)

[*Whinney*: In Jarman on Wills, 5th ed. vol. ii. p. 888, that case is said to be of no authority.]

Bellasis v. *Ermine* (7) is to the same effect. In *Scott* v. *Tyler* (8) Lord Thurlow takes the law to be as stated in *Reynish* v. *Martin.* (2) *Gillet* v. *Wray* (5) lays down no general principle, and should be applied with caution. In order to bring this case within the exception as to gifts over, there must be an express gift over of the thing given; a mere residuary bequest will not displace the general rule: *Wheeler* v. *Bingham.* (9)

Cur. adv. vult.

1898. Nov. 5. STIRLING J. The question which is raised on this summons is whether a condition which the testator has seen fit to annex to the gift of an annuity to his son in the event of his marriage is a condition in restraint of marriage and void according to the law. [His Lordship referred to the will and codicil, and read the summons.] It is agreed that I cannot on the present occasion give any decision as to the annuity given

(1) (1817) 3 Mer. 108, 117–8.
(2) 3 Atk. 330.
(3) 2 Vern. 572; 1 Eq. C. Ab. 111.
(4) (1678) 2 Eq. C. Ab. 212.
(5) 1 P. Wms. 284.
(6) 2 Bro. P. C. 261, Toml. ed.
(7) (1663) 1 Ch. Ca. 22.
(8) 1 W. & T. 7th ed. 535.
(9) (1746) 3 Atk. 364, 367.

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to the widow, but that gift must be borne in mind in dealing with the gift to the son. With regard to the nature of this condition, it appears to me to be clear, although it is contained in the codicil, that it must be treated as being contained in the will, and as a condition precedent and not a condition subsequent. Then arises the question whether it is valid or invalid. If one had to deal with that question according to the English common law, such a condition being a condition precedent would be perfectly valid, as is shewn by the decisions as to real estate, and the son, unless he married with the consent, would not be entitled to take a devise of land subject to such a condition. That, however, is not so where the gift to which the condition is annexed is made out of pure personalty; and in the present case the testator had no real estate, and I have to deal with personal estate alone. That doctrine was laid down by Lord Hardwicke in *Reynish* v. *Martin*. (1) There the head-note is this: "A mother by her will says, that if her daughter marry with the consent of trustees, or the major part of them, and signified in writing, before such marriage had, then I give to her, and not otherwise 800*l.* and directed M. to pay her 30*l.* yearly whilst she continued sole, by 15*l.* each May Day, and All Saints Day, and charged all her real estate with debts of all kinds and legacies. The daughter after the death of the mother married the plaintiff without the consent of the trustees, and died soon after, but before her death the trustees declared their consent and approbation in writing. Lord Chancellor directed the plaintiff should be paid the arrears of the 30*l.* pro rata till the marriage; and in case the personal estate should be exhausted by payment of debts, so much of the real estate to be sold as will pay the 800*l.* and arrears of the annuity."

I observe upon the form of that gift that the payment of the 30*l.* was only whilst she remained sole, and did not continue after the marriage either with or without consent. The materiality of the observation will appear presently. Dealing with the legacy of 800*l.*, Lord Hardwicke says (2): "I apprehend that taking this as a mere personal legacy, the plaintiff by the rules of the civil and ecclesiastical law, and which have been con-

(1) 3 Atk. 330. (2) 3 Atk. 331.

stantly adhered to in this court, will be entitled to the legacy; for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, that this is not looked on as a condition annext to the legacy, but as a declaration of the testator in terrorem. This rule is so strictly adhered to in the ecclesiastical court, that the marrying without consent is not considered there as a breach of the condition, *although the legacy is actually given over*; but that rule has not been carried so far in this court, for in many instances here it has been considered as a breach of the condition, and the legacy thereby forfeited; but that differs from the present case, because here the legacy is given to *Mary* only, *without any limitation over*. But then it was objected, that there is a strong and material difference between a *condition precedent* and subsequent, and this being *a condition precedent*, and as the condition was not performed nothing vested, because the event was not come, on which the legacy was to take effect. Undoubtedly this is true in general both in law and equity; but I do not find that the civil or ecclesiastical law have made any distinction between conditions precedent and subsequent, but that in both cases the condition as such is merely void."

In that case the Lord Chancellor held that the condition was inoperative, and that the legacy was payable although the personal estate had been exhausted in the payment of the debts. Nevertheless, as these debts were charged by the will on the real estate, the Lord Chancellor made a decree marshalling the assets so that the legacy might be payable. That is an absolute decision that, notwithstanding that the condition was a condition precedent, it was one that was inoperative in a court of equity, and that the legatee was entitled to the legacy although the condition was not fulfilled. No case has been cited to me, nor am I aware of any, which throws any doubt on that decision. The rule there laid down is a plain and simple one, which, if it had been strictly adhered to, would have been easy to apply; but Lord Hardwicke himself points out that the rule of the civil and ecclesiastical courts had not been adopted to its full extent: he says that in many cases where there was

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a gift over the legacy had been held to be forfeited. Sir William Grant in *Lloyd* v. *Branton* (1) refers to this distinction, and says: "Different reasons have been assigned by different judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely in terrorem, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect."

That exception does not appear to me to cover the present case; and what was mainly relied on was another exception, or class of exceptions, which was established by the decision of Lord Cowper in *Gillet* v. *Wray*. (2) That case was as follows: "A man by his will leaves his granddaughter an annuity of 10*l*. per annum for life, and afterwards, by a codicil to his will, declares, that 'if his granddaughter shall marry with the good liking of his trustees, then she shall have 150*l*. in lieu of the annuity, and her annuity to cease.' The granddaughter afterwards marries one worth nothing, and without the consent of any of the trustees. Whereupon it was objected by Serjeant Hooper, that the restraint of marriage was only in terrorem, and that the granddaughter, notwithstanding her having married as above, ought to have the 150*l*. portion. But the Lord Cowper decreed the contrary, saying, here was a provision made either way, and where the provision for the child is in the alternative, and there is a condition precedent to the gift of the portion, (viz.) if *she marries with consent &c.* and that is not performed, and the child is still provided for, tho' not with the greater portion, equity, in that case, does not relieve." Prior to that time there had been decisions in an opposite sense. Lord Thurlow, in *Scott* v. *Tyler* (3), a well-known case upon the whole of the law relating to this subject, comments thus upon the cases: "It was made a question, formerly, what a legatee should take on her marriage, under a bequest of 200*l*.

(1) 3 Mer. 117. (2) 1 P. Wms. 284.
(3) 1 W. & T. 7th ed. 535, 551.

if she married, or 100*l.* if she did not. Some thought 300*l.*, some 200*l.*, some 100*l.* In our books we find it determined formerly, in the case of a greater legacy given upon marriage with consent, or after a certain age, and a less in the other events, that the greater legacy was not forfeited by marrying against the condition; but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition; but Lord Cowper determined otherwise, on alternative bequests." He therefore recognises Lord Cowper's decision in *Gillet* v. *Wray* (1); and that case has been treated as establishing the law by all the subsequent text-writers down to the present time. It is not inconsistent with the decision in *Reynish* v. *Martin* (2), for, as I have already pointed out, the payment of 30*l.* per annum ceased on marriage, whether with or without consent, and there was no alternative bequest such as is found in *Gillet* v. *Wray*. (1) I must therefore treat that as a valid exception to the general rule laid down by Lord Hardwicke. Whether if it had been my lot to decide the case before Lord Cowper I should have decided it the same way, I need not consider; the exception appears to be one which is established, and one to which the Court must pay attention. Then I must ask myself whether the present case falls within it. The language is not the same, but I cannot see any difference in substance. Lord Thurlow, in the passage already quoted from *Scott* v. *Tyler* (3), treats Lord Cowper's decision as determining the general question, What is the effect of a gift of a larger sum to a legatee if she married with consent, and a smaller sum if she did not? Here the question is, What is the effect of a gift to a son in any event with the addition of a larger gift in the event of his marrying with consent? It appears to me that the two cases are substantially the same and ought to be governed by the same rules. This view appears to have been taken in Ireland in the case of *Holmes* v. *Lysaght*. (4) That case was afterwards taken to the House of Lords, but was there

(1) 1 P. Wms. 284.
(2) 3 Atk. 330.
(3) 1 W. & T. 7th ed. 535, 551.
(4) 2 Bro. P. C. 261, Toml. ed.

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compromised. It is not, therefore, a very weighty authority; but so far as it goes it is in favour of the view which I have adopted. For these reasons I think that the condition is operative, and I declare accordingly.

Solicitors: *Corsellis, Mossop & Berney; Monro, Slack & Co., for Wheeler & McCutcheon, Belfast; L. C. Webb; Pollock & Co.*

H. B. H.

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In re WATSON.
GUARDIANS OF STAMFORD UNION *v.* BARTLETT.

[1898 W. 2164.]

Lunatic—Pauper—Maintenance—Limitations Act, 1623 (21 *Jac.* 1, *c.* 16).

A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of the S. Union for sixteen years prior to her death in 1898. In 1895, the lunatic having become entitled to a fund, a receiver was appointed in Lunacy; and thereupon the guardians gave notice of a claim for past and future maintenance to the Master in Lunacy, who replied that the claim would be borne in mind in dealing with the fund. The fund was, however, not recovered by the Lunacy authorities till after the death of the lunatic, and was afterwards transferred to the Chancery Division. In an action by the guardians against the legal personal representative of the lunatic for arrears of maintenance:—

Held, that the plaintiffs were entitled only to six years' arrears from the commencement of the action.

In re Newbegin's Estate, (1887) 36 Ch. D. 477, followed.

Stedman v. *Hart*, (1854) Kay, 607, distinguished.

ADJOURNED SUMMONS.

Elizabeth Watson, a lunatic not so found by inquisition, was, from a period commencing not later than 1882 until her death in 1898, maintained in the Bracebridge Pauper Lunatic Asylum at the cost of the guardians of the Stamford Union. At the time when she was first admitted to the asylum she had no means; but in January, 1894, an illegitimate son of hers, who had settled in Kimberley, South Africa, died there intestate, and by Cape law she became entitled as one of the next of kin to a share of his estate. In the spring of 1894 Mr. John Greenfield, who was acting as solicitor for others of the next of

kin and also for Mr. Cranswick, the person appointed in South Africa to administer the son's estate, communicated these facts to Messrs. Toynbee, Larken & Toynbee, the solicitors of the guardians. A correspondence then ensued between the solicitors as to obtaining representation of the lunatic's estate, and on May 10, 1894, Messrs. Toynbee, Larken & Toynbee wrote to Mr. Greenfield: "It appears to us that the first step is to have appointed a committee of the estate and person of the mother of the deceased, and we have obtained an authority from the board of guardians who are responsible for her maintenance to take the necessary proceedings at their instance"; and they suggested the appointment of the medical superintendent of the asylum. On May 25 they again wrote to Mr. Greenfield: "We know nothing whatever of the next of kin of the lunatic and think it most probable that objection would be taken to the appointment of any one or more of them by the guardians of the union having a claim for maintenance"; and they then repeated their suggestion that the medical superintendent of the asylum should be appointed. Eventually, in May, 1895, an order was made under s. 116 of the Lunacy Act, 1890, for the appointment of Mrs. Bartlett, a married sister of the lunatic's, to exercise the powers of a committee of the lunatic, but the order was not drawn up until August 2, 1895.

On November 19, 1895, Messrs. Stileman, Neate & Toynbee, the London agents of Messrs. Tonybee, Larken & Toynbee, wrote to the Master in Lunacy as follows:—

"Elizabeth Watson (spinster).

"We venture to address you under the following circumstances. For many years past the above-named Elizabeth Watson has been an inmate of the Bracebridge Pauper Lunatic Asylum where she has been maintained at the expense of the Stamford Board of Guardians for whom we are concerned. In the month of May last we understand that an order for the appointment of a receiver was made on the application of the next of kin but we are unable to ascertain whether it is proposed to make any provision for past or future maintenance nor do we know the name or address of the receiver. We have communicated with Mr. Greenfield, the solicitor acting for the

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next of kin, on the subject but we have not succeeded in obtaining any satisfactory information in the matter and our clients are naturally desirous that their claims should not be overlooked. Being merely creditors we presume that our clients have no locus standi which would enable them to apply in the Lunacy by summons but we feel assured that if the facts are brought to your notice their just claims will not be ignored." On November 20, 1895, Messrs. Stileman, Neate & Toynbee received from Mr. Greenfield a letter giving them the information they required, and containing an assurance that the claim for maintenance would be settled in due course; and on the same day they wrote again to the master to this effect, requesting him at the same time to remember their clients' claim when the matter was again brought before him.

On November 21, 1895, the following reply was sent from the office of the Masters in Lunacy.

"*Re* Elizabeth Watson.

"In reply to your letters of the 19th and 20th November I am directed by the master to say that the claim of the guardians will be borne in mind in dealing with the fund belonging to this patient. I should, however, say that, as a further order will be required to make the fund when lodged in court available, some further delay is likely to take place."

On June 8, 1898, the Lunacy authorities not having succeeded in getting the property of the lunatic within their jurisdiction, an order in Lunacy was made against Mr. Greenfield to pay into court within four days to the credit of the lunatic the sum of 1691*l.* 15*s.* 2*d.*, being the balance of moneys admitted to have been received by him from Mr. Cranswick in respect of the lunatic's interest in her son's estate.

On June 9, 1898, a summons was taken out in Lunacy by the guardians for payment of their expenses for past and future maintenance. On June 11 the lunatic died.

On June 29, 1898, Mr. Greenfield, being then unaware of the death of the lunatic, paid into court in Lunacy to the account of the lunatic the balance which he had in his hands in respect of her interest. On July 2, 1898, letters of administration to the estate of the deceased lunatic were granted to Mrs. Bartlett.

On July 4, 1898, this action was commenced by the guardians against Mrs. Bartlett by originating summons, asking for a declaration that the plaintiffs were entitled to the sums expended by them in respect of the maintenance of the pauper lunatic for the six years immediately preceding January 1, 1894, and in respect of her maintenance as from that day down to her death on June 11, 1898, and also to the sums expended by them as funeral expenses. On July 20, 1898, the defendant offered to pay the plaintiffs all arrears of maintenance not barred by the Statute of Limitations, together with the costs of the Chancery proceedings to that date; but this offer was refused.

On August 4, 1898, the Master in Lunacy by consent ordered that 1400*l.*, part of the fund in court, should be paid to the defendant as administratrix of the lunatic, and that the residue should be carried over to the credit of this action.

Sheldon, for the plaintiffs. The six years allowed by the Statute of Limitations begins to run from the date when the guardians informed the next of kin of the lunatic of their claim for maintenance, or at the latest from the date of the notice to the master. *Stedman* v. *Hart* (1) shews that the Court will take into consideration how the Lunacy authorities would have acted if the fund had been in their control, and that it was not incumbent on the guardians to bring an action as soon as they learnt that the lunatic had become entitled to the fund. In the case of *In re Newbegin's Estate* (2), which will be relied on by the defendant, *Stedman* v. *Hart* (1) was not cited. [He also referred to *Winkle* v. *Bailey*. (3)]

George Henderson, for the defendant. The plaintiffs are entitled only to six years' arrears from the commencement of the action. This case is covered by *In re Newbegin's Estate*. (2) *Stedman* v. *Hart* (1) is distinguishable, because that was a claim for costs by the solicitors acting in the lunacy who were under the control of the Lord Chancellor. The defendant has offered to pay all that the plaintiffs are entitled to; and I

(1) Kay, 607. (2) 36 Ch. D. 477.
(3) [1897] 1 Ch. 123.

STIRLING J. therefore ask that the costs subsequent to that offer may be paid by the plaintiffs.

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Sheldon, in reply.

STIRLING J. The substantial question upon this summons is whether the plaintiffs are entitled to more than six years' arrears of maintenance of an intestate, who was a lunatic, from the date at which the summons was taken out. The defendant is the legal personal representative of the lunatic who, from a date not later than 1882, was maintained in the county lunatic asylum by the guardians of the Stamford Union, who are the present plaintiffs. [His Lordship stated the facts, and referred to the correspondence:—]

The first question is, Do the sums expended by the guardians for the maintenance of the lunatic constitute a debt? The second is, Assuming that to be so, is the legal personal representative of the lunatic entitled to set up the Statute of Limitations? Both these questions were considered and decided by Chitty J. in *In re Newbegin's Estate*. (1) Upon the first point he came to the conclusion that there was a debt arising either by virtue of a pre-existing common law liability, or by virtue of a new obligation created by statute. Upon the second point he says this (2): "If this is a debt apart from the statute"—he was there dealing with the Lunatic Asylums Act, 1853, which has now been replaced by the Lunacy Act, 1890—"then it follows as a matter of course that the lunatic, appearing as he does now by his guardian ad litem, is entitled to set up the Statute of Limitations, and there is no pretence, as was partly suggested in argument, for saying that this Court is to administer the lunatic's estate in some such way as to pay all the debts without regard to the question of the Statute of Limitations. The lunatic is entitled to defend himself in this proceeding as if it was an action brought against him." Upon the alternative view that the debt arose by virtue of a new obligation, he says, "the section is silent with regard to the Statute of Limitations, and it is competent for the lunatic to set it up"; and he held that the guardians were not entitled to recover more than six years' arrears.

(1) 36 Ch. D. 477. (2) 36 Ch. D. 484.

That applies to the present case. The defendant is not the lunatic, but is the legal personal representative of the lunatic; and it appears to me that, no less than the lunatic herself, the legal personal representative is entitled to set up the Statute of Limitations. The only answer to the statute is that certain applications were made in Lunacy, and it is said that, if the Lunacy authorities had had the fund in their control to be distributed by them, they would have done what is just, and given the applicants six years' arrears from, at any rate, November 19, 1895, when the letter to which I have referred was sent by the guardians to the Master in Lunacy. How that may be I do not know. I cannot say how they would have exercised their jurisdiction over that part of the estate which was in their custody. But the jurisdiction of the Lunacy authorities has ceased: the lunatic is dead; and, if that is not enough, the fund has been partly paid to the legal personal representative and partly paid into court to the credit of this action; and it appears to me that I am bound to administer it according to the law, of which the Statute of Limitations forms part.

It is said that there is a decision which warrants me in holding that greater arrears can be given. That is the case of *Stedman* v. *Hart*. (1) In that case an order was made in Lunacy by the Lord Chancellor directing taxation of the costs of a firm of solicitors employed in prosecuting the commission in Lunacy, and subsequently as the solicitors of the committees. That order was made in 1842; but, owing to the small amount of the lunatic's income, the taxation was deferred, and in 1848, pending the proceedings for that purpose, the lunatic died. In 1852 a second order was made in the lunacy for taxation of the costs properly incurred to the solicitors in the lunacy by the committees, and in 1853 the solicitors filed a bill against the legal personal representatives of the lunatic for the amount found due on the taxation. Wood V.-C. held that these costs constituted a debt for necessaries supplied to the lunatic, and that the Statute of Limitations was out of the way, because it was a debt due to the solicitors in the lunacy, who were subject to the jurisdiction of the Lord

(1) Kay, 607.

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Chancellor, and would have been restrained if they had attempted to bring an action to recover these costs. The Vice-Chancellor says this (1): "I think that I must treat the costs incurred in this case as a debt for necessaries supplied to the lunatic, and imply a contract on the part of the lunatic for that purpose. It is argued for the defendants, that, in that case, an action might have been brought against the lunatic—as no doubt it might; and that, therefore, as no proceedings have been taken for six years, nothing can prevent the operation of the Statute of Limitations to bar the claim. But I have considerable doubt whether that is the correct view in a case of this description. Suppose the lunatic had been placed in an asylum under the direction of the Lord Chancellor in Lunacy, and there supplied with the necessaries of life, and that payment for these was not enforced for seven or eight years during the lunacy—would this Court say that time had run against all the demands? I think that the Court would take notice of these circumstances, and of the certainty that the moment any action was brought, the Lord Chancellor would deal with it on a petition in the matter of the lunacy. There might be some difference in the case of a common tradesman; but as regards these solicitors, the Lord Chancellor in Lunacy would have perfect control over them, and would not allow them to enforce their demand; and in this case he appears to have exercised his jurisdiction by ordering taxation of their costs. I think I must take judicial notice of what the Lord Chancellor would do under such circumstances." Does that reasoning apply here? I cannot see how it does. The Vice-Chancellor himself takes notice of the fact that there might be a difference in the case of a tradesman suing for goods supplied. It was established by the case of *Brockwell* v. *Bullock* (2) that an action may be brought against a lunatic for the purpose of recovering a debt for necessaries, and that a creditor is not compelled to have resort to proceedings in Lunacy. It seems to me, therefore, that as a matter of law six years' arrears only can be recovered from the date at which this summons was taken out.

On July 20, 1898, an offer was made by the legal personal

(1) Kay, 611. (2) (1889) 22 Q. B. D. 567.

representative of the lunatic to pay that amount, with the costs of the proceedings in the action down to that date, and I am asked to order the plaintiffs to pay the subsequent costs down to the present time. I do not think that I ought to accede to that view. Undoubtedly it is a hard case, because according to the rules of simple honesty the guardians seem entitled to be recouped for the sum paid for the maintenance of the lunatic for the earlier period. But, of course, I am bound to decide the case according to the legal rights of the parties. At the same time, having regard to the decision of Wood V.-C. in *Stedman* v. *Hart* (1), I think that this was a proper case to bring before me. I do not see my way to give the plaintiffs any costs after the date of the defendant's offer; but, on the other hand, I do not think that they ought to be required to pay any costs.

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Solicitors: *Stileman, Neate & Toynbee, for Toynbee, Larken & Toynbee, Lincoln; J. W. Sykes, for Edgell, Kingston-on-Thames.*

H. B. H.

In re M.

STIRLING J. 1898 *Oct.* 25; *Nov.* 22.

[1898 M. 560.]

Practice—Jurisdiction — Lunatic Trustee — Appointment of New Trustees — Vesting Order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116–119, 133–143, 342—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25–41.

The High Court has jurisdiction under the Trustee Act, 1893, to appoint a new trustee in the place of a sole surviving trustee who is a lunatic not so found.

The High Court has not jurisdiction in such a case to make a vesting order.

Semble, where a vesting order is required, resort should be had to the Lunacy jurisdiction.

THIS was an originating summons taken out on behalf of J. L. M., a person of unsound mind not so found by inquisition, asking that new trustees of the settlement made on the marriage of the applicant's father and mother might be appointed

(1) Kay, 607.

STIRLING J. 1898 M., *In re.*

in substitution for a deceased trustee and the sole surviving trustee, who was also a person of unsound mind not so found; and the summons further asked that the right to call for a transfer of, and to transfer into the names of the new trustees, a sum of 4949*l.* 7*s.* 3*d.* 2¾ per cent. Consolidated Stock now standing in the names of the old trustees in the books of the Governor and Company of the Bank of England, and to receive any dividends now due and to become due thereon, might vest in the new trustees.

The summons was intituled in the matter of the trusts of the settlement and in the matter of the Trustee Act, 1893. The question was now raised whether the summons ought not to have been in Lunacy.

Kenyon Parker, for the applicant. The question is whether the Trustee Act, 1893, gives the Court jurisdiction to appoint a new trustee and make a vesting order in a case where both the applicant and the present trustee are persons of unsound mind not so found. There is a doubt whether the old jurisdiction is taken away or still exists side by side with the jurisdiction conferred by the Lunacy Act, 1890. Prior to that Act the jurisdiction of the Court to appoint a new trustee and make a vesting order where it was expedient to do so was clear: *In re Lemann's Trusts.* (1) There the trustee was "incapable to act" through age and infirmity.

By the Lunacy Act, 1890, the same jurisdiction has been given to the Judge in Lunacy as existed in the Court of Chancery before that Act: see ss. 116–119, 133, 136.

Sect. 141 empowers the Judge in Lunacy to appoint new trustees in every case where he has jurisdiction to make a vesting order.

Sect. 143 enacts that the provisions of the Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant; it says nothing as to the appointment of new trustees. That section has given rise to the question whether it was intended by the Act of 1890 to abolish the jurisdiction of the High Court and

(1) (1883) 22 Ch. D. 633.

to substitute that of the Lunacy authority in cases where a sole trustee happens to be a lunatic; and it is to be observed that it does not come under the heading of "Management and Administration" which comprises ss. 116–130, but under that of "Vesting Orders" (ss. 133–143).

By the Trustee Act, 1893, the provisions of the Act of 1850 as to the appointment of new trustees and the making of vesting orders are repeated, notwithstanding the Act of 1890: see ss. 25, 35. So that apparently it was intended to leave the parties to invoke whichever jurisdiction they preferred. It is for obvious reasons not always desirable to apply in Lunacy.

The word "lunatic" does not occur in the Act.

[STIRLING J. The question seems to be whether, reading the two Acts of 1890 and 1893 together, the Act of 1890 was not intended in the case of lunatic trustees to give the jurisdiction to the Lunacy Court, and to limit the jurisdiction in Chancery to other cases.]

The Act of 1890 did not take away from the Chancery Division any jurisdiction which it had before the passing of that Act.

[STIRLING J. referred to *In re Ormerod.* (1)]

Under the Act of 1893 the Court has jurisdiction to appoint a trustee and make a vesting order "wherever it is expedient." Those words are nearly as wide as possible, and there is nothing in the Act to shew an intention that they are not to apply in the case of persons of unsound mind. [He also referred to *In re Phelps' Settlement Trusts* (2), *In re Bignold's Settlement Trusts* (3), and Morgan's Chancery Acts and Orders, 6th ed. p. 65.]

Arkle, for the respondents.

Cur. adv. vult.

1898. Nov. 22. STIRLING J. Before considering the powers conferred by the Act of 1893, it is necessary to see what were the statutory powers of the Court at the time when it was passed. These were derived under the Trustee Act, 1850, and

(1) (1858) 3 De G. & J. 249. (2) (1885) 31 Ch. D. 351.
(3) (1872) L. R. 7 Ch. 223.

STIRLING J. the Trustee Act, 1852. [His Lordship referred to the provisions of those Acts, and continued :—]

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Under those Acts it has been established that as a general rule, where a vesting order was required by reason of a trustee being of unsound mind, the Lunacy jurisdiction had to be resorted to : see *In re Davidson* (1) ; *In re Good Intent Benefit Society* (2) ; *In re Ormerod* (3) ; *In re Mason* (4) ; *In re Martin's Trusts.* (5) It has, however, been held that where the trustee of unsound mind was also an infant, the jurisdiction conferred on the Court of Chancery by s. 7 of the Trustee Act, 1850, might be exercised : *Re Arrowsmith's Trusts* (6) ; and the like conclusion was arrived at where the lunatic trustee was out of the jurisdiction : *In re Gardner's Trusts* (7), the judgment in which case shews the ratio decidendi. There Jessel M.R. said : " The only point decided in *In re Mason* (4) was, that in the case of a lunatic trustee you should intitule your petition in Lunacy as well as in Chancery under the 3rd section of the Act. The Court of Appeal, however, in directing the petition to be so intituled do not appear to have given any reason for the direction. The 9th section of the Act says that when the trustee is out of the jurisdiction the Court of Chancery may make a vesting order ; and the 3rd section says that when the trustee is a lunatic the judges in lunacy may make a vesting order. When you read the two sections together they evidently mean this, that when a lunatic trustee is within the jurisdiction the judges in lunacy should make the order, but that when he is out of the jurisdiction the Court of Chancery—now the Chancery Division—may alone make the order, just as in the case of any other trustee out of the jurisdiction."

It has also been held that where the legal estate in land sold under the order of the Court of Chancery was vested in a person of unsound mind not so found, the Court of Chancery had power to make a vesting order under s. 1 of the Trustee Act, 1852 : *Herring* v. *Clark.* (8)

In cases where the Lunacy jurisdiction was resorted to for a

(1) (1850) 20 L. J. (Ch.) 644.
(2) (1854) 2 W. R. 671.
(3) 3 De G. & J. 249.
(4) (1875) L. R. 10 Ch. 273.
(5) (1887) 34 Ch. D. 618.
(6) (1858) 6 W. R. 642.
(7) (1878) 10 Ch. D. 29.
(8) (1868) L. R. 4 Ch. 167.

vesting order, and the appointment of a new trustee was also required, it was the usual course to make the order both in Lunacy and in Chancery; but wherever s. 10 of the Trustee Act, 1852, was applicable, the order was properly made in Lunacy alone: *In re Owen.* (1) If no vesting order was required, the Court of Chancery had power to appoint a new trustee in the place of one who had become lunatic: *In re Boyce* (2); *In re Sparrow* (3); *In re Vickers' Trusts* (4); *In re Martin's Trusts.* (5)

It has been suggested that a reason why it was held that the Court of Chancery had no power to make a vesting order on the appointment of a new trustee in the case of a lunatic is to be found in the language of s. 34 of the Trustee Act, 1850, stating the effect of the vesting order. It is true that there are no words which expressly refer to the freedom of the old trustees from disability; but such words are equally absent in ss. 7 and 9, under which it was held that the Court of Chancery might make vesting orders although the trustee was of unsound mind. Again, the terms of s. 26 of the Trustee Act, 1850, and s. 6 of the Trustee Act, 1852, with reference to vesting orders of stock, are the widest possible. Yet *In re Ormerod* (6) shews the opinion of the Court of Appeal to have been that the Court of Chancery had no power to make a vesting order either as regards realty or personalty. Finally, the absence of such words was not regarded by the Master of the Rolls in *In re Gardner's Trusts* (7) as an obstacle to his making an order under s. 9 of the Trustee Act, 1850.

This being the state of the law, there was passed, in 1890, the Lunacy Act, 1890, which by s. 342 repealed (inter alia) all the sections of the Trustee Act, 1850, and the Trustee Act, 1852, which conferred on the Lunacy authority powers of making vesting orders or appointing new trustees, and substituted for them a series of enactments (ss. 133–142), conferring similar or extended powers on the Judge in Lunacy.

(1) (1869) L. R. 4 Ch. 782.
(2) (1864) 4 D. J. & S. 205.
(3) (1870) L. R. 5 Ch. 662.
(4) (1876) 3 Ch. D. 112.
(5) 34 Ch. D. 618.
(6) 3 De G. & J. 249.
(7) 10 Ch. D. 29.

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Sect. 143 provides as follows: "The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant." It is remarkable that nothing is said as to the power of the High Court in the case of lunatic trustees out of the jurisdiction: *In re Gardner's Trusts* (1); or under s. 1 of the Trustee Act, 1852: *Herring* v. *Clark*. (2) The section appears, however, to shew that it was not the object of the Act of 1890 to extend the jurisdiction of the High Court as regards the making of vesting orders in the case of lunatic trustees. The result, therefore, was that from the passing of the Lunacy Act, 1890, down to the passing of the Trustee Act, 1893, the High Court had no power to make a vesting order in the case of a lunatic trustee which that Court did not possess before the Act of 1890 came into operation. By s. 51 of the Act of 1893 the sections of the Acts of 1850 and 1852, which conferred on the Court of Chancery power to make vesting orders and appoint new trustees, were repealed, and there were substituted for them a series of enactments contained in ss. 25–41, conferring on the High Court powers similar to those given by the repealed sections of the Trustee Acts. The contention on behalf of the applicant is that the power of the High Court has been extended by those sections, so that, whereas prior to 1893 that Court had no power to make a vesting order on the appointment of a new trustee in the place of a person of unsound mind, it now has jurisdiction to do so.

The language of s. 32 of the Act of 1893 is in some respects wider than that of s. 34 of the Trustee Act, 1850, and it expressly refers in some cases, though not in all, to the capacity of the trustee. The reason, however, why it was held that the Trustee Act, 1850, conferred no jurisdiction on the Court of Chancery to make a vesting order when the trustee was of unsound mind was not, in my opinion, the presence or absence of words referring to incapacity from unsoundness of mind, but the existence in the Act of 1850 of clauses which dealt specially with the case of such trustees. Such clauses are not found in the Trustee Act, 1893, but they do exist in the Lunacy Act, 1890.

(1) 10 Ch. D. 29. (2) L. R. 4 Ch. 167.

The Trustee Act, 1893, does not expressly deal with incapacity on the part of a trustee caused by unsoundness of mind. The Lunacy Act, 1890, and the Trustee Act, 1893, are simply statutes consolidating the existing enactments with reference to lunatics and trustees respectively; and, looking at the history of the legislation on the subject, I have been unable to satisfy myself that the general terms used in the latter Act were intended to confer a jurisdiction which down to that time the High Court had not enjoyed. Seeing the great importance which attaches to vesting orders, and the undesirability of their being made by Courts whose jurisdiction is open to doubt, I think that the safe and proper course in the present case is to abstain from making a vesting order, and so bring the present decision under the review of a higher Court, by which I trust the question will be set at rest. At the same time, I consider that I have jurisdiction to appoint a new trustee, and am willing to do so if the applicant desires it.

Dec. 2. *Kenyon Parker* again mentioned the matter to the Court, and asked for the appointment of a new trustee.

STIRLING J. made the order accordingly.

Solicitors: *Trower, Freeling & Parkin; Field, Roscoe & Co., for Gibbons & Arkle, Liverpool.*

G. A. S.

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Oct. 25;
Nov. 4.

FRIARY HOLROYD AND HEALEY'S BREWERIES, LIMITED *v.* SINGLETON.

[1897 F. 1645.]

Lease—Option to Purchase—Assigns—Equitable Assignee—Possession.

The equitable assignee of a lease who has omitted to perfect his title by a legal assignment, although in possession of the premises and paying the rent reserved by the lease, is not entitled to the benefit of an option to purchase given to the lessee, his executors, administrators, and assigns.

In a covenant giving an option to purchase, the word "assigns" means the persons entitled to the term as between them and the lessor, and to the benefit of the covenants entered into by the lessor and lessee respectively which run with the land demised.

ACTION.

By a lease of August 21, 1880, a messuage beerhouse and premises known as the White Lion, Aldershot, were demised by Augustus Edward Henry Stone to Charles Hoskins Master for the term of twenty-one years, from December 25, 1876, at the yearly rent and subject to the lessee's covenants and conditions therein mentioned; and the said A. E. H. Stone thereby covenanted with the said C. H. Master that, if the said C. H. Master, his executors, administrators, and assigns, should at any time during the continuance of the said term be desirous of purchasing the freehold of the said premises thereby demised at the price of 450*l.*, and of such his or their intention should give six calendar months' notice in writing to the said A. E. H. Stone, his heirs or assigns, he the said A. E. H. Stone, his heirs or assigns, would convey and assure such freehold, at the expense in all respects of the said C. H. Master, his heirs and assigns, to the said C. H. Master, his heirs and assigns, upon payment of such sum of 450*l.*, the said C. H. Master thereby for himself, his heirs, executors, administrators, and assigns, covenanting with the said A. E. H. Stone, his heirs and assigns, to accept the same title as that under which the premises were conveyed to him—namely, a deed of grant of February 13, 1877.

By an indenture of October 20, 1880, the freehold of the

beerhouse, subject to the said lease, was conveyed by A. E. H. Stone to the defendant in fee simple.

The lease subsequently became duly vested for the residue of the said term of twenty-one years in the Friary Holroyds and Healey's Brewery, Limited (hereinafter referred to as the "old company"), which went into voluntary liquidation in June, 1895, with a view to reconstruction.

By an agreement of June 25, 1895, made between the old company, by its liquidator, of the one part, and the plaintiff company (therein called the "new company") of the other part, the old company agreed to sell, and the new company agreed to purchase, all the undertaking and assets of the old company, including the benefit of all business and other rights held by or on behalf of the old company, and all other rights of action and property of any description belonging to or held by or on behalf of the old company. In pursuance of this arrangement the plaintiff company took possession of the beerhouse, and continued to pay the rent reserved by the lease.

On December 14, 1896, the secretary of the plaintiff company wrote to the defendant's son, who acted as her agent, the following letter:—

"*Re* White Lion, Aldershot."

"Will you kindly inform me if you are willing that my company should complete this purchase at once instead of waiting till next year. The matter of the year's rent can of course be arranged. I shall be obliged by a reply at your earliest convenience."

The plaintiff company relied on this letter as being a sufficient notice of their intention to exercise the option to purchase given by the said lease. Some correspondence followed, and then the matter was placed in the hands of the defendant's solicitors, and in July, 1897, they wrote to the plaintiff company alleging that no sufficient notice to exercise the option to purchase had been given; and, as the defendant declined to complete the purchase, the plaintiff company on November 1, 1897, commenced the present action against the defendant, claiming a declaration that they had exercised the option to purchase contained in the said lease, and that the defendant

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might be ordered, upon payment of the purchase-money of 450*l.* and the costs of the conveyance, to execute a conveyance of the beerhouse to the plaintiff company.

The plaintiff company in their statement of claim alleged that the lease became vested in them in November, 1895; but at the trial it appeared that no assignment of the demised premises to the plaintiff company had ever been executed by the old company. The final return to the Registrar of Joint Stock Companies of the concluding meeting in the winding up of the old company under s. 143 of the Companies Act, 1862, was made August 5, 1897; so that the old company would be "deemed to be dissolved" pursuant to that section on the expiration of three months from that date.

The action was tried with witnesses; but the only question argued which requires any detailed notice in this report was whether an equitable assignee of a lease, who had neglected or omitted to perfect his title by a legal assignment, could exercise an option to purchase given to the "assigns" of the lessee.

Farwell, Q.C., and *E. E. Fletcher*, for the plaintiff company. The letter of December 14 was a sufficient notice of our intention to purchase, and there is now a binding contract; it was only when the matter got into the hands of the defendant's solicitors that the validity of this notice was disputed, and it would be inequitable, having regard to what has taken place since the notice, to allow the defendant to repudiate this contract: *Hughes* v. *Metropolitan Ry. Co.* (1) We are entitled to exercise this option to purchase as the equitable transferees of the lease from the old company. Under the agreement of June, 1895, the plaintiff company became the equitable owners of this lease, with the benefit of the option, which the old company in equity assigned to them: for present purposes an equitable assign stands in as good a position now as a legal assign: *Walsh* v. *Lonsdale.* (2) We have been in possession, and the rent reserved by the lease has been regularly accepted by the defendant.

Neville, Q.C., and *L. S. Bristowe*, for the defendant. It is

(1) (1877) 2 App. Cas. 439. (2) (1882) 21 Ch. D. 9.

said that, for the purposes of this option, there is no difference between an equitable and a legal lessee, and for this *Walsh* v. *Lonsdale* (1) is relied on. *Walsh* v. *Lonsdale* (1) lays down no such proposition. An agreement to take an assignment of a lease, even coupled with possession on the part of the equitable assignee, gives the lessor no right to sue on the covenants in the lease: *Cox* v. *Bishop*. (2) The covenant here is a legal covenant, and the option given can only be exercised by the legal assigns. Possession and acceptance of rent would only make the plaintiff company a tenant from year to year; it would not create the tenancy alleged to have been assigned to them; as a fact, the defendant knew nothing about the reconstruction of the old company: the name continued almost exactly the same. The plaintiff company could not have been sued at law by the defendant on the lessee's covenants; neither could the plaintiff company have sued the defendant as the lessor's assignee: Woodfall, Landlord and Tenant, cap. vii. s. 5 (*a*). The plaintiff company, therefore, is not entitled to the benefit of this option, and the action fails and should be dismissed.

Farwell, *Q.C.*, in reply. *Cox* v. *Bishop* (2) only decides that the absence of a legal right does not create an equitable remedy; and, besides, that case was prior to the Judicature Act. There is only one court now, and the Equity rules prevail in it: *Walsh* v. *Lonsdale*. (1) It was always intended that the plaintiff company should take over all the assets of the old company and be in the same position: the present difficulty arises from the fact that the old company has ceased to exist, so that it is now impossible to perfect our title or get any further assignment; we cannot even join the old company as plaintiff. The objection is a purely technical one: we are the owners of the lease, and to all intents and purposes the "assigns" of the old company.

Cur. adv. vult.

1898. Nov. 4. ROMER J. The plaintiffs contend that the letter of December 14, 1896, was a good notice under the lease to purchase the freehold at the end of the term. But, apart from

(1) 21 Ch. D. 9. (2) (1857) 8 D. M. & G. 815.

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any question arising on the wording of that letter, it appeared on the evidence, when the plaintiffs came to prove their title, that at the time the letter was written and up to the commencement of this action they were not the legal assignees of the lease, but only the equitable assignees of the legal owners. They were not, therefore, in my opinion the persons entitled under the lease, as against the lessor, to give the notice, and the lessor did not become bound under the lease on receipt of that letter to sell or assure the freehold to the plaintiffs. The word "assigns" in the option to purchase in the lease given to the lessee, his executors, administrators, or assigns, had in my opinion the same meaning as the word "assigns" added to the lessee's name in the covenants entered into by and with him in the lease. In other words, it meant the persons entitled to the term as between them and the lessor and bound by and entitled to the benefit of the covenants entered into by the lessee and lessor respectively which ran with the land demised. The plaintiffs, though in possession, could not have been sued at law by the lessor on the lessee's covenants, nor could the plaintiffs have sued the lessor's assigns on his covenants in the lease. Nor would the lessor or his assigns have any right in equity to sue the plaintiffs on the lessee's covenants by reason of the plaintiffs being equitable assigns of the lessee's term and in possession: see *Cox* v. *Bishop*. (1) And see *Moore* v. *Greg* (2), decided by Knight Bruce when Vice-Chancellor and affirmed on appeal by Lord Cottenham (3), who at the same time pointed out that the case of *Lucas* v. *Comerford* (4) was not a binding authority. The case of *Walsh* v. *Lonsdale* (5) has no bearing on the case now before me. That was a case concerning the rights of two persons under an agreement whereby one agreed to grant a lease to the other and possession had been taken on the footing of the agreement, and it was held that the tenant in possession must be held, as between him and the landlord, to hold on the terms of the agreement as if the lease had been granted.

(1) 8 D. M. & G. 815.
(2) (1848) 2 De G. & Sm. 304.
(3) (1848) 2 Ph. 717.
(4) (1790) 1 Ves. 235; 3 Bro. C. C. 166.
(5) 21 Ch. D. 9.

In my judgment, therefore, in the case before me no valid notice under the lease was given. And the fact that the company which contracted to sell the term to the plaintiffs has been dissolved and cannot now assign need not be considered.

Nor can I find that the defendant is in any way estopped or prevented from now taking the point that the plaintiffs were not entitled to give the notice to exercise the option under the lease. As a matter of fact, it appears that when the letter of December 14, 1896, was sent, and down to the trial of this action, the defendant and her son and agent were wholly unaware that the plaintiffs were not the same company as that now dissolved, or that the dissolved company, the then legal owner of the term, had equitably assigned to the plaintiffs, or was not still in possession of the premises. And further, it appears that when the letter of December 14, 1896, was received, and during a great part of the subsequent correspondence that ensued, the defendant's son, who acted for her, was under the impression that she was bound to sell to the plaintiffs; and immediately her solicitors were informed that no notice under the lease had been given, they at once took up the position that the defendant was in nowise bound by what had passed.

It follows that the plaintiffs cannot assert as against the defendants that any due or sufficient notice under the lease was given. This being so, it is not disputed that the plaintiffs' case must fail, for, apart from a contract made by service of notice under the option, no contract, certainly no contract sufficiently set forth in writing, can be established as against the defendant.

It follows that the action fails. And I can see no sufficient reason for depriving the defendant of costs, especially as I think the wording of the letter of December 14 would tend to lead the defendant's son to think that the plaintiffs were already in the position of lessees who had given a valid notice under the lease, and that the only question was whether the purchase should be completed at an earlier date than that fixed by the notice.

Solicitors: *Peacock & Goddard, for Capron & Sparkes, Guildford; Ingoldby & Adkin.*

W. C. D.

ROMER J.

1898

Oct. 25, 26; *Nov.* 8.

WAUTON *v.* COPPARD.

[1897 W. 3531.]

Vendor and Purchaser—Restrictive Covenant—Noise—Nuisance—Boys' School —Misrepresentation by Vendor's Agent—Rescission.

A deed of covenant of 1851, relating to a building estate, after forbidding certain offensive and noisy trades and businesses, provided that there should not be carried on "any trade or business or occupation whatsoever whereby any injurious offensive or disagreeable noise or nuisance shall or may be occasioned caused or made." The plaintiff entered into a contract for the purchase from the defendant of a house on this estate for the purpose of a boys' school, on the representation of the defendant's agent that there was nothing in this deed which would prevent him from carrying on such a school on this property. On an action for rescission of the contract:—

Held, that the carrying on of the plaintiff's school in an ordinary and reasonable way would be within the wording of the restrictive covenant, which could not be limited to trades or businesses ejusdem generis with those specifically mentioned; and that the plaintiff, having been induced by a misrepresentation of fact made by the defendant's agent to enter into this contract, was entitled in equity to rescission, even though the representation had not been made fraudulently.

ACTION.

The plaintiff kept a preparatory school for boys at Tonbridge, and, being under notice to quit his present house, was in September, 1897, on the look-out for fresh premises upon which to carry on his school; in that month he entered into negotiation with an auctioneer at Tonbridge Wells, who acted for the defendant, for the purchase of a freehold house known as "Wissenden," situate in Calverly Park Gardens, Tonbridge Wells, and containing a garden and grounds of some two acres. The defendant's agent was aware of the purpose for which Wissenden was required, and informed the plaintiff, in answer to an inquiry on this point, that there were no restrictions which would prevent the house from being used for the purpose for which it was wanted by the plaintiff. At a subsequent interview, printed particulars and conditions of sale, which had been prepared for a previous sale by auction, were

produced and shewn to the plaintiff. Condition 7 was as follows: "The property is sold subject to the covenants and provisions contained in a deed of covenant dated the 3rd day of November, 1851; a copy of such deed can be inspected at the above-mentioned office of the vendor's solicitors during a period of seven days prior to the day of, or in the sale-room at the time of, sale, and the purchaser is to be deemed to have full notice of the contents thereof." The plaintiff asked to see this deed of covenant, but was told it was not immediately forthcoming; and he was subsequently told that the deed contained nothing that would interfere with the carrying on of a school. The plaintiff eventually signed a contract for the purchase of Wissenden for 5000*l.* on the terms of the printed conditions so far as they applied to a sale by private treaty, and paid a deposit of 500*l.*

When the title came to be investigated, it was found that the deed of November 3, 1851, contained a covenant as follows: "And shall not and will not suffer to be exercised or carried on upon or in any part of the land comprised in the said plan" (which included the site of Wissenden), "or any house or building thereon to be erected or built the trade or business of a melter or boiler of tallow, or grease, or resin, or tar, or any greasy substance or compound for any purpose whatsoever, gas maker or worker, blacksmith, tinworker, coppersmith, brickmaker, lime-burner, slaughterman, catgut spinner, dog-skinner, boiler of horse-flesh, soapmaker, beershop-keeper, brewer, scavenger, cowkeeper, or any trade or business or occupation whatsoever whereby any unwholesome or offensive or disagreeable smell or gas, or unwholesome or offensive or disagreeable matter, deposit, or fluid, or any injurious or offensive or disagreeable noise or nuisance shall or may be collected occasioned caused or made."

The plaintiff thereupon declined to complete his purchase, and demanded the return of his deposit; and, as this was refused, he commenced the present action, claiming rescission of the said contract, and repayment of his deposit with interest.

The action was tried with witnesses, and there was a good deal of evidence, some of it conflicting, by the plaintiff and

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several masters from various schools as to the proper control and habits of boys, and the amount of noise made by them when let out from school; there was also evidence by neighbouring owners, who had bought their property under the same restrictions, and considered that the covenants in the deed of 1851 ought to be enforced; that what they objected to was the prospect of cricket and other balls coming over the boundary fence, school-bells ringing, boys shouting at play, which they considered would be an intolerable nuisance, and the consequent depreciation of their property; one of them added that if the plaintiff's school came he should look into his title-deeds and get his solicitor to interfere.

It appeared that Calverly Park Gardens was a residential neighbourhood, covered with private houses rented at or worth 250*l.* per annum.

Neville, *Q.C.*, and *Martelli*, for the plaintiff. The restrictions imposed by this covenant cannot be limited to trades and businesses ejusdem generis with those previously specifically mentioned: *Tod-Heatly* v. *Benham.* (1) The school cannot be carried on in the usual and reasonable way without some noise, which must cause an appreciable interference with the pleasurable enjoyment of their homes by the neighbouring owners, and consequently it will be a nuisance within the decision of *Tod-Heatly* v. *Benham.* (1) As the plaintiff claims rescission of the contract, an action was necessary: *In re Davis and Cavey.* (2)

The plaintiff never had a fair opportunity of ascertaining for himself what the covenants in the deed of 1851 were before he signed this contract; he is not, therefore, affected with constructive notice of the covenant: *Reeve* v. *Berridge* (3); he entered into this contract on the faith of the representations made to him by the defendant's agent that there was nothing in this deed of covenant which would prevent him from carrying on his school, and on this ground he is entitled to rescission: *Redgrave* v. *Hurd.* (4) The plaintiff was induced to purchase

(1) (1888) 40 Ch. D. 80.
(2) Ibid. 601.
(3) (1888) 20 Q. B. D. 523.
(4) (1881) 20 Ch. D. 1.

this property on a misrepresentation of fact made by the defendant's agent: *Mullens* v. *Miller*. (1) There is practically no dispute on the evidence as to the statements made to the plaintiff by the defendant's agent. Even assuming that the carrying on of a school in the ordinary way is not within the wording of the covenant, it is clear on the evidence that some of the adjoining occupiers strongly object to a school anywhere near them; so that the house is not suitable for the purposes for which the plaintiff required it, and he was induced to enter into this contract on a representation by the defendant's agent that it was.

Warmington, Q.C., Farwell, Q.C., and *Ribton*, for the defendant. The real question in this case turns on the construction of this deed of covenant of 1851, subject to which the plaintiff agreed to purchase. *Reeve* v. *Berridge* (2) has no application to this case: there is no usual form of restrictive covenants in a deed of this kind. Though possibly the plaintiff might successfully resist an action brought against him by the defendant for specific performance, he is not entitled by reason of our agent's misrepresentation to have this contract rescinded; he purchased subject to this covenant: it is not enough for him to shew that some of the adjoining owners may bring an action against him: *In re Scott and Alvarez' Contract*. (3) It is said that every word in this covenant must be read as if it formed the subject of a separate covenant; that is not so: *Tod-Heatly* v. *Benham* (4) does not go as far as that. Various inoffensive trades, such as that of a tailor, a chemist, or grocer, could be carried on; the general words relied on by the plaintiff are only meant to apply to offensive or noisy trades such as those previously specified. The plaintiff's evidence as to the amount of noise made by a school is much exaggerated. The statements made by our agent were as to the effect of this deed, and amount to a misrepresentation of law, which gives no ground for rescission: *Beattie* v. *Lord Ebury* (5); his statements only

(1) (1882) 22 Ch. D. 194.
(2) 20 Q. B. D. 523.
(3) [1895] 1 Ch. 596; 2 Ch. 603.
(4) 40 Ch. D. 80.
(5) (1872) L. R. 7 Ch. 777.

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amounted to a representation that the deed did not expressly forbid a school being carried on, which was true.

Neville, Q.C., in reply.

Cur. adv. vult.

1898. Nov. 8. ROMER J. It is clear in this case that the plaintiff was induced to enter into the contract of which rescission is sought by the representation made to him by the defendant's agent that the restrictive covenants to which the property was subject would not prevent the plaintiff from carrying on his school on the property. As the agent knew, the plaintiff contemplated buying the property for the purposes of his school, and the statement made by the agent was therefore of the utmost importance, especially as the deed containing the restrictive covenants to which the property was subject was not forthcoming, and the plaintiff had no opportunity of seeing it, or even a copy of it. It is contended on the defendant's behalf that this statement of his agent only amounted to a representation that the deed did not expressly prevent a school being carried on upon the property; but, in my opinion, the substance, and not the mere form of the representation, has to be looked at. And from the plaintiff's evidence in chief (which I accept) as to what passed at the first interview between him and the agent, it is clear that the agent's statement made then and at the subsequent interviews was made in answer to the plaintiff's inquiry put at that first interview, when the plaintiff stated he wanted the place for his school, and asked if there were any covenants affecting the property having regard to the purpose for which he wanted it. And on the evidence I am satisfied that what the agent in substance represented, and what the plaintiff understood the representation to be, was that the covenants would not interfere with the plaintiff in carrying on his school on the property. It now appears that the covenants, after specially restraining certain trades or businesses from being carried on, also provide that there shall not be carried on upon the premises any trade, or business, or occupation whatsoever, whereby (inter alia) any

injurious or offensive or disagreeable noise or nuisance shall or may be occasioned, caused, or made. And in my opinion, as a matter of construction, the deed means what it says, and the covenants cannot be held limited to trades or businesses ejusdem generis as those previously specially mentioned: see *Tod-Heatly* v. *Benham*. (1) The next question is whether the covenants will interfere with the plaintiff in carrying on his school in an ordinary and reasonable way. Now, I am satisfied that if the plaintiff should be compelled to carry out the contract, and proceed to carry on his school in the ordinary way, he will immediately have an action brought against him by the adjoining proprietors to restrain him from doing so on the ground that a "disagreeable" if not an "injurious or offensive noise or nuisance" is thereby caused or made; and I think that action would succeed. But, putting aside the evidence before me as to what action or actions particular adjoining owners have threatened or are likely to bring, what I have to consider is, following in substance the words of Cotton L.J. in *Tod-Heatly* v. *Benham* (2), whether I am satisfied by argument and the evidence before me that reasonable people living near, having regard to the ordinary use of their houses for pleasurable enjoyment, could and would regard the carrying on of this school in the ordinary way on these premises as causing an injurious, or offensive, or disagreeable noise or nuisance. And, after hearing the arguments on the evidence before me, I answer this question in the affirmative. But then it is said, on the defendant's behalf, that the agent's representation only amounted to a statement as to a point of law—namely, as to the true construction of the deed—and that though the plaintiff might successfully resist an action against him for specific performance, he is not entitled, by reason of the agent's representation, to have the contract rescinded. But, in my opinion, the agent's representation to the plaintiff, so far as the plaintiff is concerned, was a statement as to a fact. The agent was not asked by the plaintiff as to the construction of the deed, or on any question of law, but merely whether as a fact there were any covenants affecting the

(1) 40 Ch. D. 80. (2) 40 Ch. D. 94.

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property, having regard to the purpose for which the plaintiff wanted it. And the agent chose to take upon himself to answer this question in the negative. No doubt he did not intend to deceive the plaintiff, and believed his answer to be correct. But the plaintiff is not concerned with what induced the agent's belief; and, even if that belief arose from the agent wrongly construing the deed or making a legal mistake, it would not concern the plaintiff, or enable the defendant to say that as between the agent and the plaintiff the misrepresentation was only one of law. I come to the conclusion, therefore, that in this case the contract has been induced by a misrepresentation of fact made by the defendant's agent; and, this being so, it is clear that the plaintiff is entitled in equity to rescission of the contract, even though the misrepresentation was not made fraudulently. I therefore decree rescission of the contract, and order repayment of the deposit with interest at 4 per cent., and the defendant must pay the costs of the action.

Solicitors: *C. F. Martelli, for Richard Preston, Tonbridge; Lee, Ockerby, & Everington, for E. E. Robb, Tonbridge Wells.*

W. C. D.

ECCLESIASTICAL COMMISSIONERS *v.* PINNEY.

C. A. 1898 Nov. 3.

[1896 E. 346.]

Glebe Lands—Contract for Sale by Vicar—Entry by Purchaser—Payment of Interest on Purchase-money—Non-payment of Principal—Ecclesiastical Commissioners—Action by—Specific Performance—Vendor's Lien—Ecclesiastical Leasing Acts, 1842 (5 *&* 6 *Vict. c.* 108) *and* 1858 (21 *&* 22 *Vict. c.* 57).

In 1873 a vicar, with the approval of the Ecclesiastical Commissioners and with the consent of the patron of his living, agreed to sell the glebe lands of the vicarage under the powers of the Ecclesiastical Leasing Acts, 1842 and 1858, for 24,963*l.* to the trustee of a settled estate who had power to invest trust funds in the purchase of land.

The contract was entered into with the consent of the then tenant for life of the settled estate, and the Ecclesiastical Commissioners were parties to and executed it.

The title was accepted, and the then tenant for life entered into possession, and paid the vicar interest on the purchase-money. The vicar died, the estate devolved, and payment of the interest (which was more than an investment of the purchase-money would have produced) was continued by the tenant for life for the time being to the vicar for the time being until 1896, when, the purchase-money being still unpaid, the Ecclesiastical Commissioners brought an action against the present vicar, the tenant for life, and the legal personal representatives of the trustee, for specific performance of the contract and damages, or an account and a declaration that they were entitled to a lien on the lands and to enforcement thereof:—

Held, that it was the duty of the plaintiffs to see that the powers given by the Ecclesiastical Leasing Acts were properly applied, and that they had good ground of action.

The judgment of Bigham J., sitting for Byrne J., reversed.

Appeal from Bigham J., sitting for Byrne J.

By an indenture dated July 28, 1873, and made between the Rev. John Digby Wingfield Digby, the then incumbent of the Vicarage of Coleshill, Warwickshire, of the first part, George Digby Wingfield Digby, the patron of the vicarage, of the second part, the Ecclesiastical Commissioners of the third part, and R. B. Wingfield Baker, the surviving trustee of the will of Edward, Earl Digby (the settlor), of the fourth part, J. D. W. Digby as such incumbent, in pursuance of the powers and provisions of the Ecclesiastical Leasing Acts, 1842 and 1858, with

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the consent of the said G. D. W. Digby as such patron, and with the approval of the Ecclesiastical Commissioners, agreed to sell, and the said R. B. W. Baker, with the consent and approbation of the said G. D. W. Digby as tenant for life for the time being of the estates devised by the will of Edward, Earl Digby, agreed to purchase certain hereditaments forming part of the glebe lands belonging to the Vicarage of Coleshill for the sum of 24,963*l.*, and the said R. B. W. Baker also agreed to pay the said purchase-money into the Bank of England to the credit of the plaintiffs on or before September 29, 1874, at which time the purchase was to be completed; but if from any cause (other than the wilful default of the vendor) the purchase should not be completed on that day, the said R. B. W. Baker was to pay interest on the purchase-money at 4 per cent. per annum from that day until the purchase should be completed.

The indenture also contained a clause (No. 8) which provided that, in case default should be made by the purchaser in payment of the purchase-money on the day fixed for completion, it should be lawful, but not incumbent on the vendor or the vicar for the time being, "at any time thereafter and notwithstanding any intermediate negotiation," by notice in writing to the purchaser, to require payment to be made within one month from the date of the notice; and if such payment should not be duly made the contract should be deemed to have determined, and the vendor or the vicar should be entitled to recover from the purchaser the costs, charges, and expenses incurred in and about the contract without the tender of a conveyance, or the performance of any other act or thing whatsoever.

The title was accepted; and, on September 24, 1874, George D. W. Digby, as the tenant for life, with the privity and approval of R. B. W. Baker, entered, under the agreement, into possession and receipt of the rents and profits of the said hereditaments, and continued in possession thereof until his death in the year 1883. Upon his death John D. W. Digby, the next tenant for life, entered into possession of the said rents and profits, and he continued in such possession until his death in 1888. Upon his death John Kenelm D. W. Digby,

the present tenant for life, entered into possession, and he had ever since been, and now was, in possession of the rents and profits of the said hereditaments, and he was also the patron of the vicarage.

In 1874 John D. W. Digby ceased to be Vicar of Coleshill, and John Charles Pinney had ever since been and now was vicar thereof.

No part of the purchase-money of 24,963*l.* was ever paid, and no conveyance of the glebe lands comprised in the contract for sale had ever been executed; but the successive tenants for life of the settled estate, George, John, and John Kenelm D. W. Digby, while in possession and in receipt of the rents thereof had, up to the commencement of this action, paid to the Vicar of Coleshill for the time being interest on the purchase-money. Such interest was for some time paid at the rate of 4 per cent. per annum, but for several years past had been paid at 3¼ per cent. only. And it appeared that this interest was more than the income which the vicar would have obtained from the investment of the purchase-money if it had been paid.

The value of the lands comprised in the contract having considerably decreased since it was entered into, and a further decrease being probable, the Ecclesiastical Commissioners, in March, 1896, commenced this action against Mr. Pinney the present vicar, John Kenelm D. W. Digby the present tenant for life of the settled estates and patron of the vicarage, the legal personal representatives of R. B. W. Baker the purchaser under the contract of July 28, 1873, and three gentlemen who had in 1882 been appointed and now were the trustees of the estates settled by the will, and in whom the real and personal estates subject to the trusts thereof were now vested.

In this action the plaintiffs claimed by their amended statement of claim—(1.) that the said agreement might be specifically performed by the defendants, and that they might be ordered to do and concur in doing all acts and things necessary or proper for the completion of the purchase; (2.) damages in addition to or in lieu of specific performance; (3.) in the alternative an account of what was due to the plaintiffs for principal and

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interest in respect of the purchase-money payable under the agreement, and a declaration that they were entitled to a lien or charge upon the hereditaments comprised in such agreement in respect of the purchase-money, and to have such lien or charge enforced by sale or otherwise; and (4.) a receiver.

Statements of defence were delivered, and the action came on for trial before Bigham J., sitting for Byrne J., on May 13, 1898, when the learned judge took the view that the contract was a contract by a purchaser with two promisees, the vicar and the commissioners, to pay one of them, i.e. the commissioners; that the commissioners could not themselves convey the glebe lands, and could not sue the purchaser for specific performance unless the vicar was a co-plaintiff; and, considering that the only interest which the commissioners had under the Ecclesiastical Leasing Acts was to see that if and when the purchase-money was paid, it should be paid in a certain manner, his Lordship, without going into the defences, dismissed the action with costs.

The Ecclesiastical Commissioners appealed.

Cozens-Hardy, *Q.C.*, *Astbury*, *Q.C.*, and *Pochin*, for the appellants. The Ecclesiastical Commissioners have a good right of action in this case. The Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), empowered any ecclesiastical corporation, either aggregate or sole (except as therein mentioned), with certain consents and under certain restrictions to lease all or any of the lands belonging to such corporation; and by the Act of 1858 (21 & 22 Vict. c. 57), ss. 1, 2, if it shall be made to appear to the satisfaction of the Ecclesiastical Commissioners that any of the lands belonging to any such corporation which were by the Act of 1842 authorized to be leased might, to the permanent advantage of the estate or endowments belonging to such corporation, be sold, then it shall be lawful for such corporation, with the consent of the patron of the benefice, and with the approval of the Ecclesiastical Commissioners, to sell all or any part of such lands. And the Act provides that all the purchase-money to arise on any such sale

shall be payable and paid to the Ecclesiastical Commissioners as if they were the sole vendors of the property sold in consideration thereof, and that it shall be lawful for such ecclesiastical corporation with such approval and consents to make and execute such contracts and agreements in such manner and for such considerations as to the Ecclesiastical Commissioners shall appear advisable.

Under these statutes, therefore, no sale of these lands could have been made without the approval of the Ecclesiastical Commissioners; the consideration for the sale must be such as they shall deem reasonable and proper, and the purchase-moneys must be paid to them as if they were the sole vendors of the property. So they are not merely persons consenting to an ordinary contract. They have important duties to perform, and are bound to see that the powers conferred by the Acts are properly applied, and to insist on the statutory requirements being complied with. In *Ecclesiastical Commissioners* v. *Wodehouse* (1), where it was held that the Ecclesiastical Commissioners were entitled to an injunction to prevent the working of mines in glebe lands otherwise than under a lease sanctioned by them, the same principles were applied, and the case is an authority that the commissioners have an interest in the lands, and are entitled to sue. Moreover, in the present case the appellants were parties to and executed the contract for sale. The lands comprised in the contract have been treated as being no longer glebe lands; they have been included in the resettlement of the estate devised by the late Lord Digby, and a portion of them have been actually exchanged, so that restitutio in integrum is impossible.

Eve, *Q.C.*, and *R. F. Norton*, for John Kenelm D. W. Digby, the present tenant for life. This respondent is, no doubt, in possession of the lands in question subject to the vendor's lien; but he is neither by contract nor otherwise liable to pay this purchase-money, and any action for specific performance ought to be dismissed as against him. He would, no doubt, be a proper party to an action to enforce, by foreclosure or sale, a charge upon the land for the unpaid purchase-money. But the

(1) [1895] 1 Ch. 552.

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tenant in tail, who would be a necessary party to any such action, is not before the Court; and the real object of this action is not to enforce a vendor's lien, for the land is not now worth half the 24,963*l.* which was the amount of the purchase-money in 1873. The real object is to enforce payment of that amount. Specific performance was all that the plaintiffs asked for before Bigham J., and nothing was said then about any lien on the land. Moreover, the contract contained a clause (No. 8) providing that, if default should be made in payment of the purchase-money, the vendor or the vicar might at any time after the day fixed for completion put an end to the contract. And there is nothing to prevent their doing so at this moment. The contractual relationship is, therefore, subject to an overriding power in the real vendor, the vicar.

[LINDLEY M.R. That power has not been exercised, and how does it benefit you now? The requisite notice has not been given.]

This shews, at all events, that the contract was to be left, free from interference by the commissioners, in the hands of the persons who were the real contracting parties; and they can say, "We do not desire to enforce it." The commissioners need not have been parties to the contract at all, because the purchase-money must, by statute, come to their hands, whether they were parties or not. It could not go in any other channel. All that they have to do is to approve of a particular sale in a particular manner. They are not contracting parties in any sense. They do not agree with the purchaser, nor do they agree in anything except that the vicar shall sell. The vicar and the trustee are the only contracting parties, and the commissioners cannot on the strength of their approval, and because the purchase-money was to be paid in to their account at the Bank of England, intervene between the contracting parties, and say, "The contract must be specifically performed whether you desire it or not." The vicar for the time being is the only person who can sue. The Act of 1858 shews in s. 4 who is to sue and be sued in the case of an ecclesiastical corporation, and enacts that contracts entered into by the person in his corporate capacity may be enforced against his successors;

so that the trustee could not have sued the commissioners, but only Mr. Pinney, and the commissioners would not have been proper parties to an action for specific performance against him.

An analogy may be found in the cases under the Settled Land Acts. Under those Acts, upon a contract for sale by a tenant for life to a purchaser, the purchase-money has to be paid to the trustees, but the trustees could not sue upon the contract. The case must be treated as if the purchase was completed in 1873, and as if the purchase-money, although not actually paid to the commissioners, was allowed by them to remain on the security of the lands under the powers conferred by s. 2 of the Act of 1858.

The commissioners cannot sue anybody, or if they can, they cannot at all events sue the present tenant for life.

[They referred to *Scales* v. *Scales*. (1)]

[CHITTY L.J. referred to *Lee* v. *Lee*. (2)]

Carson, for Mr. Pinney, took no part in the argument.

Brinton, for the legal personal representatives of Mr. Baker, the purchaser under the contract of July 28, 1873. I adopt the arguments used on behalf of the present tenant for life. There are many cases in which persons may be consenting parties to a contract, and may even be bound by a contract, without having any right to enforce specific performance of it. The position of the trustees upon a sale by a tenant for life under the Settled Land Acts has already been referred to; and as additional illustrations, (*a*) a lessee who cannot assign without his lessor's consent makes his consenting lessor a party to an agreement for sale of the leasehold premises; and (*b*) upon the sale of glebe lands under the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), the sale has to be made with the approval of the Land Commissioners, and the purchase-money is to be paid to them; but in the one case the lessor could not, and in the other the Land Commissioners could not, sue for specific performance, though each of them has an interest in the land. In like manner the Ecclesiastical Commissioners are merely a body whose consent is necessary, and who, having given their consent,

(1) W. N. (1878) 106. (2) (1876) 4 Ch. D. 175.

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stand by and let the matter go on without having any right themselves to sue for specific performance.

Sargant, for the trustees of the settled estates.

Cozens-Hardy, Q.C., in reply. We have never abandoned our alternative claim to a lien on the land for the unpaid purchase-money, which is an incident to every action for specific performance, and a consequential part of the relief to which a plaintiff in such an action is entitled.

[He was stopped by the Court.]

LINDLEY M.R. I think this action was disposed of in rather too summary a manner; and it appears to me that, having regard to the facts set forth in the statement of claim, and to the Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), it is not right to say that the plaintiffs cannot recover anything in the action as framed. I do not propose to express any opinion as to the particular form of relief which would have to be given. We have not gone into the defences, and we know nothing whatever about them; but Bigham J. has taken the summary view that the plaintiffs are not entitled to any relief in this action. Now, there I differ with him. I desire to say nothing which may prejudice the defence; but the position of the Ecclesiastical Commissioners in this case is not the position of a person who has consented to something being done by other parties in an ordinary contract. The Ecclesiastical Commissioners have, by statute, very important duties to perform. For the performance of those duties they have rights conferred upon them, and, as I read the statute 21 & 22 Vict. c. 57, it is the duty of the commissioners, rather than their right, to see that this purchase-money is properly obtained and secured.

I say nothing about the technical form of pleading; but, upon the true construction of this Act of Parliament, the Ecclesiastical Commissioners cannot possibly be treated as having nothing whatever to do with the purchase except to give their consent to it. The contract is one of the circumstances which brings into existence the necessity for them to perform their duties, and to exercise the rights which are incidental to the performance of those duties. I do not look

upon this as an ordinary contract for specific performance at all; it is something far more than that. It is an action brought by the Ecclesiastical Commissioners in performance of their statutory duties; and, of course, the contract is important to be set out, because it is the existence of that contract which gives rise to those duties and gives rise to their rights. Whether they will succeed in maintaining an action for specific performance in the narrow technical sense of the expression, or whether they will be compelled to fall back upon their vendor's lien, I do not know; but, in my opinion, the statute imposes on them the duty and confers on them the right to get this money, if they can; and I am not at all satisfied that they cannot.

I think, therefore, that the appeal must be allowed. The judgment of Bigham J. will accordingly be set aside; the action will be remitted for trial before Byrne J., to whose Court it is attached; and the costs, both here and below, will be costs in the action.

CHITTY L.J. I agree.

VAUGHAN WILLIAMS L.J. I also agree.

Solicitors: *Milles, Jennings-White & Foster; Dawson, Bennett & Ryde; Hulberts, Hussey & Metcalfe.*

W. W. K.

C. A.
1898
Nov. 18.

In re RAILWAY TIME TABLES PUBLISHING COMPANY, LIMITED. *Ex parte* WELTON.

[1892 R. 0211.]

Company—Winding-up—Creditor—Proof—Fully paid Shares taken in Payment of Debt—Failure of Consideration.

A creditor of a company for a sum partly secured by debentures of the company and partly unsecured surrendered the debentures to the company upon the terms of the company giving him new debentures for a smaller amount and fully paid-up shares for the balance (secured and unsecured) of the debt, and he had the shares registered in the name of a trustee. In the winding up of the company some of the shares were held to be unpaid. The trustee, having been settled on the list of contributories in respect of the unpaid shares, took an assignment of the debt, and claimed to prove for the amount due on the shares :—

Held, that to the extent of the unpaid shares there had been no payment or satisfaction of the debt, and that the trustee was not precluded by being a member of the company from taking an assignment of the debt and proving for the unpaid balance.

This was an appeal from a decision of Kekewich J. refusing an application by Mr. T. A. Welton in the winding up of the above-named company for liberty (notwithstanding the time limited for making claims had expired) to make and establish his claim as a creditor of the company for the sum of 2840*l.*, with interest thereon at the rate of 10 per cent. per annum as from July 30, 1890.

The circumstances which gave rise to the claim were as follows :—

Prior to October 16, 1890, Mr. Henry Hoare was a creditor of the company for 13,402*l.* 18*s.* Of this debt 7840*l.* was secured to the extent of 1600*l.* by debentures of the company bearing interest at 6 per cent., and to the further extent of 6240*l.* by debentures bearing interest at 10 per cent., the balance of the debt being unsecured.

On October 16, 1890, under an arrangement with the company, Mr. Hoare surrendered these debentures for 1600*l.* and 6240*l.* to the company upon the terms of the company issuing in exchange new debentures for 5000*l.*, and also 1680 fully paid

preference shares of 5*l.* each (amounting to 8400*l.*), as against the remaining debentures and the unsecured balance of the debt, less 2*l.* 18*s.*

The transaction was thus recorded in the minute-book of the company :—

"Preference shares were signed and sealed in favour of Mr. Hoare as follows :—

	£	s.
6 per cent. debentures	1600	0
10 „ „	6240	0
Loan account	5000	0
Interest on 6 per cent. to July 30 . .	46	16
„ „ 10 „ „ „ . .	304	4
„ „ loan account to July 30. .	202	3
Balance from January 30 . . .	9	15
	13,402	18
£		
Debentures exchanged . . 4000		
To exchange 1000		
Preference shares . . . 8400		
——	13,400	0
Balance due to Mr. Hoare . .	2	18"

The 1680 preference shares were, by agreement between Mr. Hoare and Mr. Welton, registered in the name of Mr. Welton, who held the shares as nominee for Mr. Hoare.

At the date of the issue of these shares no part of the principal moneys secured by the debentures for 7840*l.*, which had been surrendered, was due or payable.

In November, 1891, Mr. Hoare became bankrupt.

In March, 1892, the company went into liquidation.

In July, 1893, Kekewich J. held in the course of the winding-up that of the 1680 preference shares above referred to 1112 were fully paid, but the remaining 568, representing so many of the surrendered debentures as were not represented by the new issue of debentures for 5000*l.*, were wholly unpaid, on the ground that the principal moneys secured by the surrendered

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debentures were not at the date of the surrender, October 16, 1890, immediately payable by the company, and therefore could not be properly set off against the amounts payable in respect of the preference shares. Mr. Welton was accordingly held liable to pay 2840*l.* as contributory, and he had since paid the larger part of this amount.

To the extent to which the surrendered debentures (which were still retained by the company) were not represented by the new debentures, i.e., to the extent of 2840*l.*, Mr. Welton now claimed to treat the same as still subsisting.

The time limited for making claims against the company expired in 1892, and the certificate of the company's debts was made by the chief clerk in 1894. The assets of the company were more than sufficient to pay all the creditors in full.

On August 4, 1897, Mr. Welton took out the present summons.

On November 3, 1897, before the hearing of the summons, Mr. Welton took an assignment from Mr. Hoare's trustee in bankruptcy of the benefit of the sum of 2840*l.*, together with interest and the benefit of all claims which Mr. Hoare might have against the company for that amount in respect of the debentures or otherwise.

Kekewich J. considered himself bound by the observations of the present Master of the Rolls upon *Mudford's Claim* (1) and *Ex parte Appleyard* (2) in *In re Addlestone Linoleum Co.* (3) to hold that Mr. Welton, not having repudiated the shares at the time of the winding-up, could not now make any claim against the company for the loss he had sustained through the shares not being fully paid up. It was argued that he was not claiming for the loss he had sustained, but was seeking to prove for the old debt; but in his Lordship's opinion it amounted to the same thing. He therefore dismissed the summons.

Mr. Welton appealed.

Eve, Q.C., and *Martelli*, for the appellant. The company having taken the appellant's money, he claims to stand in the

(1) (1880) 14 Ch. D. 634. (2) (1881) 18 Ch. D. 587.
(3) (1887) 37 Ch. D. 191.

shoes of Hoare, and he has perfected his claim by taking an assignment of Hoare's debt from his trustee in bankruptcy. The appellant claims as the assignee of Hoare. The original debentures issued to Hoare as security for his debt were surrendered by him in consideration of the company giving him fully paid shares, or upon the condition express or implied that the company would give him fully paid-up shares, and it is immaterial in whose name the shares were registered. Upon the failure of that consideration or the non-compliance with that condition, Hoare, or the appellant as his assignee, remains in the same position as if the debentures had not been surrendered. Otherwise the company, not having given fully paid shares, is in effect getting the money twice over. The appellant is not claiming damages against the company for breach of contract in not having given him fully paid-up shares, but is claiming to prove for the old debt which is revived by the failure of the consideration for which it was released, and so long as there are assets available for payment of this claim he is entitled to succeed. To this extent *Mudford's Claim* (1) and *Ex parte Appleyard* (2) may still be relied on; and there is nothing inconsistent with this contention in either *Houldsworth* v. *City of Glasgow Bank* (3) or *In re Addlestone Linoleum Co.* (4), where it was the fact of becoming a shareholder which gave rise to the litigation. In the latter case, your Lordship, the Master of the Rolls said (5), with regard to *Mudford's Claim* (1) and *Ex parte Appleyard* (2): "In each of those cases there were old debts in payment of which the shares had been given and this might support the decision that there was a right to prove—but in my opinion the orders were wrong in form." Here the appellant is not claiming in his capacity of member of the company, but in his capacity of creditor.

The delay is accounted for by the fact that a debt of this description cannot be asserted until the stage is reached of adjusting the rights of the contributories.

Renshaw, Q.C. (*F. Whinney* with him), for the liquidator.

(1) 14 Ch. D. 634.
(2) 18 Ch. D. 587.
(3) (1880) 5 App. Cas. 317.
(4) 37 Ch. D. 191.
(5) 37 Ch. D. 206.

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There are two grounds only on which the appellant can rest his case: (1.) damages for breach of contract; (2.) proof founded on failure of consideration. The answer to the first ground is that the winding-up has supervened; the answer to the second is that there is here no failure of consideration. Here there are certain things to be surrendered on the one side and certain things to be given in exchange on the other; but it is impossible to split up the consideration, or to allocate any particular shares to any particular item in the loan account, and the Court will not deal with the question of the quantum of consideration: *Harris* v. *Venables*. (1) This difficulty is illustrated by the rate of interest. Is the appellant to be paid interest at the rate of 10 per cent., as he claims, or at the rate of 6 per cent., or at any or what rate?

[LINDLEY M.R. I cannot see that he is entitled to interest.]

The appellant's claim is barred by delay.

[CHITTY L.J. It does not appear that anything has been done upon the old footing which will be disturbed.]

Eve, Q.C., in reply.

[LINDLEY M.R. We do not wish to hear you except on the question of interest.]

The appellant is entitled to be relegated to his original position, in which case he would have been paid interest.

LINDLEY M.R. When the facts of this case are really understood there is not much difficulty in applying the law, or in ascertaining what are the rights of the parties. I do not propose to make any further observations upon *Mudford's Claim* (2) and *Ex parte Appleyard* (3) than I have made before in *In re Addlestone Linoleum Co.* (4) Let us see how the matter stands. Here is a claimant—I am putting it in my own way—a Mr. Hoare, who was a creditor for 13,400*l*. Of that there is a professed payment in full or a satisfaction; it was not a payment in money, but accord and satisfaction, and, roughly speaking, what was given in accord and satisfaction was a certain number of fully paid preference shares. I say "fully paid" because it

(1) (1872) L. R. 7 Ex. 235.
(2) 14 Ch. D. 634.
(3) 18 Ch. D. 587.
(4) 37 Ch. D. 191.

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is obvious what the transaction was if you look at the minute which relates to it. It now appears that, instead of getting 1680 fully paid-up preference shares, he only got 1112 fully paid-up preference shares. What is the consequence? Why, that he has never been paid at all to the extent of the unpaid shares, namely, 2840*l.* Then why should he not prove against this company for that unpaid balance of his debt? Supposing that Mr. Hoare had not become bankrupt, that there had been no assignment to Mr. Welton, and that Mr. Welton were out of the case, subject to the question of Mr. Hoare's claim being made late—after the certificate of debts has been made, and after the other creditors have been paid in full—I should have thought that there was no answer at all to his claim to be allowed to prove against this company if there are subsisting assets sufficient to meet the claim. The suggested answer is this—that Mr. Welton is the holder of certain shares, and is the assignee of Mr. Hoare's claim, and that by reason of the provisions of the Companies Act, 1862, Mr. Welton as a member has no right of proof in respect of Mr. Hoare's debt. Is that so? Where is the statutory enactment or where is the principle of law which compels us to say that because Mr. Welton is a member of this company he cannot be regarded as a transferee of Mr. Hoare, or as asserting Mr. Hoare's right? He claims in a totally different capacity. He is not claiming to prove in respect of anything due to him as member. He is simply claiming as the assignee of Hoare's debt. I do not see what is the answer to it, and the observations made by the learned judge in the Court below appear to me to be open to this criticism—that they are not addressed to this aspect of the case. No answer to the claim has been suggested by counsel for the respondent except this—that there was not here anything which the Court could treat as a failure of consideration; but that is not made out. It comes back to this—that here is a creditor for 13,400*l.*, and to the extent of 2840*l.* he has not been paid.

Mr. Welton, as assignee of Mr. Hoare, has made a claim for interest at 10 per cent. How he gets at that I cannot conceive, except by a manipulation which does not appear to me to be admissible. He is simply a creditor for 2840*l.* There is no

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bargain that he shall have 10 per cent. interest or 6 per cent. interest, or any interest at all. If he is to have interest, he must bring himself under the statute which enables juries to give interest; and that statute does not apply. It appears to me, therefore, that his claim as to interest cannot be allowed. He is not entitled to interest in point of law. What the result of his long delay might have been if he had been entitled to interest it is unnecessary to say.

Therefore, his right must be to prove, or to be paid—for that is what it comes to—2840*l.* and no interest.

With regard to the costs: it seems to me that this summons in its present form is one which the liquidator could not possibly assent to, because it claims interest from July 30, 1890, at 10 per cent. That is obviously wrong. Mr. Welton, being out of time, is asking here for an indulgence which might and ought to have been granted to him without expense if he had not put in the claim for interest. In these circumstances it appears to me that the obvious and proper course is that he should have no costs either here or below, and that the liquidator should take his costs out of the estate.

CHITTY L.J. I agree. Now that the facts are ascertained, the case, I think, is quite simple, and I base my judgment upon this: that Mr. Welton is not claiming here in his own right, but is claiming as assignee of Mr. Hoare; and he is in neither a better nor a worse position in regard to that claim because he happens at the same time to be a shareholder. The 13,402*l.* 18*s.* shewn upon the account in the minute is a sum of cash against debentures, and against loans and various other things, and is one entire amount; and in the result it appears that 2840*l.* of that amount has never been paid to Mr. Hoare in any shape or form. Mr. Hoare, therefore, having been a creditor of the company, is entitled to have that amount paid to him as an ordinary creditor; and it is for that amount that Mr. Welton, claiming, as it appears to me, as Mr. Hoare's assign under an assignment which does not assign the debentures or any of the specific items of the account, but assigns the claim generally, is entitled to succeed on this occasion.

With regard to the interest, I have nothing to add. Mr. Hoare could not have claimed, nor can Mr. Welton claim, interest here on the sum to which he is entitled.

VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Slaughter & May; C. T. Whinney.*

H. B. H.

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HEMANS *v.* HOTCHKISS ORDNANCE COMPANY.

C. A. 1898 KEKEWICH J. *Dec.* 2. C. A. *Dec.* 8.

[1898 H. 3846.]

Limited Company—Articles of Association—Different Classes of Shareholders—Separate General Meetings of each Class—Quorum.

The articles of a limited company whose capital was divided into different classes of shares provided (art. 13) that any agreement modifying the rights attached to each class must be confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class, and "all the provisions hereinafter contained as to general meetings shall, mutatis mutandis, apply to every such meeting, but so that the quorum thereof shall be members holding or representing three-fourths of the nominal amount of the issued shares of the class." The subsequent provisions as to general meetings provided (inter alia) (art. 66) that the quorum thereat should be members personally present, not being less than three in number, holding or representing one-tenth of the issued capital of the company; and (art. 68) that if at an adjourned meeting a quorum was not present those members who were present should be a quorum. These articles were said to be in the common form:—

Held (affirming the decision of Kekewich J.), that although the provisions as to general meetings were to apply, mutatis mutandis, to class meetings, they must be so applied subject to the provision above quoted, which was inserted in art. 13 for the purpose of protecting the rights of the privileged class of shareholders; and accordingly at all class meetings, whether adjourned or not, the quorum must be the three-fourths of the members of the class required by art. 13.

APPEAL from Kekewich J.

The Hotchkiss Ordnance Company, Limited, was incorporated under the Companies Acts, 1862 to 1883, in March, 1887, with a nominal capital of 800,000*l.*, in 80,000 shares of 10*l.* each, divided into 35,000 preference shares and 45,000 ordinary shares, the preference shares entitling the holders to a

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cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon. The company was regulated by articles of association. Article 13, which was in common form (see Palmer's Company Precedents, 7th ed. Part I. pp. 410, 411), was as follows :—

"13. Whenever the capital, by reason of the issue of preference shares or otherwise, is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided such agreement is confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class, and all the provisions hereinafter contained as to general meetings shall, mutatis mutandis, apply to every such meeting, but so that the quorum thereof shall be members holding or representing by proxy three-fourths of the nominal amount of the issued shares of the class."

The following articles—also in common form—were included in a series headed "Proceedings at General Meetings":—

"66. Three members personally present shall be a quorum for a general meeting for the choice of a chairman, the declaration of a dividend, and the adjournment of the meeting. For all other purposes the quorum for a general meeting shall be members personally present, not being less than three in number, and holding or representing by proxy not less than one-tenth part of the issued capital of the company. No business shall be transacted at a general meeting unless the quorum requisite be present at the commencement of the business." (See Palmer's Company Precedents, 7th ed. Part I. p. 418.)

"68. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting if convened upon such requisition as aforesaid shall be dissolved, but in any other case it shall stand adjourned to the same day in the next week at the same time and place, and if at such adjourned meeting a quorum is not present, those members who are present shall be a quorum, and may transact the business for which the meeting was called." (See Palmer's Company Precedents, 7th ed. Part I. p. 419.)

The whole of the preference and ordinary shares of the company were issued and credited as fully paid up.

The plaintiff, Colonel Hemans, was the holder of 100 preference and 100 ordinary shares.

On July 15, 1898, a notice was issued calling separate meetings of the holders of preference and ordinary shares, in accordance with art. 13, for the purpose of passing extraordinary resolutions sanctioning two agreements dated respectively July 14, 1898, purporting to modify the rights and privileges attached to each class of shareholders. The meeting took place on July 27, 1898; but there was not present the quorum mentioned by art. 13 of either class of shareholders, whereupon the chairman, purporting to act under art. 68, declared the meeting adjourned to the same day in the following week. At the adjourned meeting, held on August 3, there was still not a quorum within art. 13; but the chairman, again purporting to act under art. 68, decided that the members present formed a quorum, and accordingly declared the resolutions passed, thus treating art. 68 as including a general meeting convened under art. 13 as well as a general meeting in the ordinary sense.

The question then arose as to whether the provision in art. 13 for a quorum at a separate meeting of shareholders of separate classes applied to adjourned meetings of the separate classes. In order to have the question decided, Colonel Hemans, on behalf of himself and all other holders of preference and ordinary shares, issued the writ in the action, claiming a declaration that the resolutions purporting to have been passed on August 3 at separate meetings of the preference and ordinary shareholders were not duly passed and were not binding; and he now moved for an injunction to restrain the defendant company and its directors until judgment or further order from acting on or carrying into effect those resolutions.

The motion was heard before Kekewich J. on December 2, 1898.

Warrington, Q.C., and *Martelli*, for the plaintiff, contended that according to the grammatical construction of the above

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articles, art. 13 provided one quorum—and one only—namely, a three-fourths quorum, for all meetings of the separate classes, whether original or adjourned: whereas in the case of ordinary general meetings, two separate quorums were provided by arts. 66 and 68, one at the original general meeting—that is, the meeting convened by the original notice—and one at the adjourned general meeting.

Swinfen Eady, Q.C., and *Kirby*, for the defendant company, contended that, according to the true construction and precise terms of art. 13, "all" the subsequent provisions as to general meetings applied including the provisions as to quorums.

KEKEWICH J. held that in construing the proviso in art. 13, all the subsequent clauses regulating the proceedings at "general meetings" must be read into and treated as applicable to it, with the exception of so much of those clauses as obviously did not apply to what might be termed the "class meetings" in art. 13, and that the quorums mentioned in arts. 66 and 68 were inapplicable to those class meetings, the quorum of which was regulated exclusively by art. 13. [His Lordship then proceeded:—]

If Mr. Swinfen Eady's contention is right, the result would be that, notwithstanding the proviso in art. 13, a resolution confirming the agreement could be passed at the meeting at which that particular quorum would not be present. That seems to me to negative the proviso altogether. The proviso was put in there as controlling the parties at the general meeting. That decides the whole question. Then Mr. Swinfen Eady says, "If that is so, it may be there might not be a quorum at the first meeting; there might not be a quorum at the second meeting; and then you would be in the air, and there would be no possibility of adjourning or of doing anything." He says that is a practical difficulty which ought to lead one to a different grammatical construction; but if it is a practical difficulty, it must be got over in a practical manner, and not by an alteration of grammar. There will be an injunction in the terms of the notice of motion.

G. I. F. C.

The company appealed. The appeal was heard on December 8, 1898.

Swinfen Eady, Q.C., and *Kirby*, for the appellants. Art. 13 contains no express provision as to what is to be done if the three-fourths quorum is not obtained. The procedure therefore at general meetings must be read into the article, and that introduces the provisions of art. 68. Kekewich J. seems to have thought that the proviso as to a three-fourths quorum applies to all class meetings, but that gives no effect to art. 68. That article is in no way more repugnant to art. 13 than it is to art. 66. The articles are in a common form: see Palmer's Company Precedents, 7th ed. Part I. p. 410.

Warrington, Q.C., and *Martelli*, for the plaintiff, were not called upon.

LINDLEY M.R. In my opinion, the construction put upon art. 13 by Kekewich J. is plainly the right one. Let us just observe what these articles are. Art. 12, which is of some importance, enacts in substance, that shares may be issued with special privileges. So that the article contemplated the existence of a class of shareholders with rights and privileges unlike those of the ordinary shareholders. Then there is a provision made for modifying those rights and privileges, and the way in which that may be done is pointed out in art. 13. That article read shortly provides that the privileges attached to each class may be modified by agreement between the company and anybody purporting to contract on behalf of the class. That would of course be far too wide if the article stopped there, so provision is made for safeguarding any such modification by this provision: "Provided such agreement is confirmed by an extraordinary resolution passed at a special general meeting of the holders of shares of that class" of shareholders. Then the article goes on to say: "and all the provisions hereinafter contained as to general meetings shall, mutatis mutandis, apply to every such meeting," that is, to every class meeting whether adjourned or not, but subject to this, which is put in for the protection of the classes: "but so that the quorum thereof"—

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that is, the quorum of every class meeting which is to alter the privileges of any class—"shall be members holding or representing by proxy three-fourths of the nominal amount of the issued shares of the class."

Now, what does that mean? It means, to my mind, exactly what it says: Work in all the regulations as to general meetings—work them in, but mind, if you are going to alter the rights of any class, you are not to apply the provisions in the articles relating to general meetings to regulate the quorum. You are to have a particular quorum for every class meeting—"but so that the quorum thereof," whether adjourned or not, it does not matter—"the quorum thereof shall be members holding or representing by proxy three-fourths of the nominal amount of the issued shares of the class." To my mind, that is the plain meaning of art. 13. The other construction involves that the rights and privileges of the members of the class may be modified, taken away, and destroyed without the protection of this special quorum. And it is obvious, to me at all events, that this cannot be the true construction. If on the adjourned meeting there is not the necessary quorum, the meeting must be adjourned until there is, or the special rights and privileges of the class cannot be altered. I think, therefore, that the judgment appealed from is right, and the appeal must be dismissed.

CHITTY L.J. I am of the same opinion. Under their memorandum of association the company had power under the articles to attach special preferences to certain shares, and that the company did. Art. 13 deals with meetings of the persons who have such priority or privileges attached to their shares, and provides for having a separate meeting of the classes of persons whose rights are proposed to be modified. The question appears to me to be a very simple one: Do these words as to a quorum which are found at the end of the 13th article run throughout the provisions which are incorporated by reference? If the articles had run thus, "substituting three-fourths for one-tenth," the case would have stood entirely differently; but it appears to me that the right reading is that the quorum of

three-fourths is required for all the purposes of the provisions which are here incorporated, namely, not merely in the 66th, but in the 68th article also. The 68th article would, if it applied without the variation which I think is to be found in it, admit of three persons only, members of the class, at an adjourned meeting giving away all the privileges which had been attached to the shares held by that class. That is a strong reason for construing the 13th article as it stands; and I think that as it stands it does not substitute three-fourths merely for one-tenth, but it maintains the requisition of a quorum of three-fourths right throughout all the articles that have been referred to. For this reason, I think the judgment was right.

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VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *N. Herbert Smith; Braunstein & Skelton.*

W. W. K.

GREY *v.* CURTICE.

C. A. 1898 KEKEWICH J. *Aug.* 4. C. A. *Nov.* 23, 24.

[1895 G. 1192.]

Solicitor—Costs—Taxation—Scale Fees—Purchase of Lands in Middlesex—Registration—"Completion of Conveyance"—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44); *General Order thereunder, rr.* 2, 4, *Sched. I., Part I.*

On a purchase of lands, the scale fee allowed to the purchaser's solicitor by Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, for "preparing and completing conveyance," covers and includes his costs (other than money out of pocket) in respect of the registration of a memorial of the conveyance in cases where the land purchased is situated within a register county.

The decision of Kekewich J. affirmed.

ADJOURNED SUMMONS.

In this action, which was brought by Mr. Grey, a solicitor, against a former client, certain accounts and inquiries had been directed to be taken and made as between the plaintiff and the defendant; and the plaintiff had brought in for taxation sundry bills of costs against the defendant. One of these bills was in

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respect of charges made by the plaintiff as solicitor to the defendant upon the purchase by the defendant of certain lands in the county of Middlesex.

The scale fee prescribed by Part I. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, as payable to the purchaser's solicitor, is expressed to be "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)."

In this case, Middlesex being a register county, a memorial of the conveyance had to be registered in the Middlesex Registry; and the question arose whether the scale fee covered the charges connected with that registration, or whether such charges should be paid by the defendant to the plaintiff in addition to the scale fee.

The taxing master found that the scale fee covered the charges for registration. The plaintiff carried in objections to this finding, which were answered and overruled by the taxing master; and the plaintiff then took out the present summons, asking that his objections might be allowed, and that the matter might be referred back to the taxing master to vary his certificate accordingly.

The summons was heard before Kekewich J. on August 4, 1898.

Wheeler, Q.C. (*R. F. Norton* and *May* with him), in support of the summons, referred to *In re Emanuel & Co.* (1) and *In re Dod, Longstaffe & Co.* (2)

Church, for the respondent.

KEKEWICH J. My duty in this case is plain. Some questions are raised which are said to be questions of principle. I see no reason to think that the taxing master has not acted on a right principle. The way in which he heard the objections commends itself to my mind. There has been no argument which convinces me that he has gone wrong. As regards questions of detail, I say now, as I have often said before, and

(1) (1882) 9 Q. B. D. 408. (2) (1888) 21 Q. B. D. 242.

as other judges have also said, that the taxing master, if he goes fairly into the matter, is far more competent to decide these questions than a judge of the High Court can be. He has gone into it with care. He has seen the parties, has had voluminous documents before him, and has come, in the exercise of his discretion, to a certain conclusion. Even if I had a strong suspicion—which I have not—that he was wrong, I should not interfere. The summons must be refused.

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C. C. M. D.

The plaintiff appealed. The appeal was heard on November 23, 24, 1898.

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Wheeler, Q.C., R. F. Norton, and *May,* for the appellant. The scale fee allowed by Part I. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, as payable to the purchaser's solicitor for "preparing and completing conveyance," does not, when the land conveyed is situate in a register county, cover the solicitor's costs of registration of the conveyance in that county, and the client must pay the cost of registration in addition to the scale fee to the solicitor. The scale fee covers the "completion" of the conveyance, but the conveyance is absolutely complete as a conveyance without registration. Sched. I. prescribes an additional payment to the solicitor "for procuring execution and acknowledgment of deed by a married woman."

[LINDLEY M.R. What has been the practice of the taxing masters?

R. F. Norton. The practice has not been uniform. I believe that the majority of the taxing masters have declined to allow the cost of registration in a register county in addition to the scale fee, though several of the masters have considered that it ought to be allowed.]

It cannot have been intended that the remuneration of the solicitor should be less when the land is situate in a register county than when it is not. He would have more to do for the same money.

[CHITTY L.J. A solicitor need not work under the scale, if he does not wish to do so.]

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According to rule 4 of the General Order, the remuneration allowed by Sched. I. is not to include fees paid on registration, and why should it include work done? The registration of the memorial is extra work for which additional remuneration should be allowed. [They referred to *In re Lacey & Son* (1) and *Drielsma* v. *Manifold*. (2)]

Church, for the respondent, was not called upon.

LINDLEY M.R. We have had an opportunity of consulting one of the taxing masters and hearing his views; and, for reasons I will give, we have come to the conclusion not to trouble you, Mr. Church, upon this question. This appeal from the taxing master involves a question of importance, which is, whether the scale fee allowed to a purchaser's solicitor for completing the conveyance does or does not cover the expense, in the case of a register county, of registering the conveyance.

The expense of registering a conveyance in a register county is occasioned as follows. First, there is the preparation of the memorial which has to be registered. That is a matter which requires care and such professional skill as is to be expected from any solicitor who understands conveyancing. It is not a thing which a client can do himself. The memorial is a legal document; and we know perfectly well from experience that there are cases in the books where the effect of registration has been lost by reason of some defect in the memorial. That is the first thing. The second thing is the sending of a clerk down to the office to register the memorial. The third is the payment of a fee at the office for registering. That fee is, of course, a disbursement—it is a payment out of pocket. Nobody supposes the scale to cover that; but it is material, with reference to this question, to observe that in rule 4 of the General Order under this Act the fee for registration is alluded to and is excluded from the scale. The rule runs thus: "The remuneration prescribed by Sched. I. is not to include," among other things, "stamps . . . . fees paid on searches to public offices, on registrations, or to stewards of manors," and so on. The importance of that is that when this scale was settled,

(1) (1883) 25 Ch. D. 301. (2) [1894] 3 Ch. 100.

the parties who settled it had their attention called to registration among other things, and they say that the scale fee shall not include out of pocket expenses, and they leave the rest unexpressed. It has been contended that in the expression "completing the conveyance" in the schedule is included the completion of it by registering a memorial of it when such step is necessary, that is to say, when the property is in Yorkshire and Middlesex. In answer to that it is said that if so, solicitors in Yorkshire and Middlesex have more to do for their scale fee than solicitors in other counties. That may be so; but, on the other hand, that result is unavoidable. Solicitors conducting purchases of property in Yorkshire and Middlesex must go and look at the register—that is quite obvious; and, on inquiry, I think the practical answer to Mr. Norton's contention is that experience shews the scale fee to be liberal enough to cover such a service as preparing and registering the memorial.

On those grounds, we are of opinion that this scale fee does cover the registration of deeds in register counties, and that registration does come, in a business sense, under the expression "completing the conveyance." That is the only point to which our attention has been called which deserves to be called a question of principle.

The appeal will be dismissed with costs.

CHITTY L.J. I am of the same opinion, and I will add a few words on the point as to registration.

We have not to consider in the abstract the meaning of the phrase "completing the conveyance," but what it means in regard to this particular case. The 2nd rule of the General Order provides that the remuneration of the solicitor "in respect of business connected with sales, purchases . . . . and other matters of conveyancing . . . . is to be regulated as follows, namely:—in respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business . . . . is to be that prescribed in Part I. of Sched. I. to this Order," that is, in other words, the remuneration is to be according to the prescribed scale. This rule then contemplates

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the application of the scale to the remuneration of the solicitor in respect of the business connected with sales and purchases completed. It is perfectly plain that if the property purchased is in a register county it is the duty of the purchaser's solicitor to advise his client that his conveyance should be registered, and if he did not give him such advice it would be a breach of duty for which he would be responsible to his client. Unless the client tells him positively not to do it—which I take to be a most improbable thing—it would be his duty to propose and to do that which was necessary for the purpose of making the conveyance a complete deed of title. Because if there was no registration of the deed, the title of the purchaser might be defeated under the statutes which require a registration, whether in Yorkshire or Middlesex.

That being so, I think there is a good ground for saying that the language of the 2nd rule should be regarded in construing the particular words used in Part I. of the schedule. Then, turning to the 4th rule, which deals in substance with costs out of pocket, which are not included in the scale for remuneration, I find that the fee on registration is particularly mentioned; and that shews that registrations, which plainly refers to registrations in register counties, were in the contemplation of those who framed the rule. Putting these things together, it appears to me that the reasonable intention of those who framed the rules, and the true meaning of the rules as they stand, is that the duty of preparing the memorial and of causing it to be registered in the proper office is included in the term "completing the conveyance." It is the doing of an act without which the conveyance might be avoided.

I concur in the observations the Master of the Rolls has made with reference to the general liberality of the scale fees. Cases occur in which solicitors will not insist on the scale fee because it is considered more than ample to remunerate them for the services performed. But however this may be, I think that the scale fee is calculated on such a footing that the solicitors will not be mulcted in anything they are justly entitled to by way of remuneration by our holding, as we are now doing, that this particular business is within the rule.

VAUGHAN WILLIAMS L.J. I agree; but I prefer to base my decision, so far as relates to this registration point, simply upon the practice. That is to say, we have got here a scale, and the words in Sched. I., Part I., undoubtedly are such as to render the construction which has been put in practice on those words a possible construction. Under those circumstances, it seems to me that when in practice that construction has been acted upon for a series of years one ought not to put a different construction upon the words, even though the balance of one's opinion may be that, on the mere words themselves, the charges of the solicitor in respect of the registration are not included in the work that is covered by the fee. On that ground of the practice heretofore, I concur in the judgment that has been pronounced.

But I wish to say that, in so far as an argument has been based upon rule 4, I cannot myself quite assent to that argument. Rule 4 is a rule which deals entirely with out of pocket expenses, and it is as if the rule had said, "The following out of pocket expenses shall not be covered by the fee." It does not seem to me that with regard to charges which are not for out of pocket expenses, as, for instance, for the professional skill and labour which are included in the preparation of the memorial, it can possibly be said that those charges are covered by the scale fee because of rule 4, which expresses the things that are to be omitted, and that, therefore, everything else must be included which is not expressed in rule 4. It seems to me that rule 4 is dealing entirely with out of pocket expenses and nothing else.

I have one other observation to make, and that is that I doubt whether one ought, in dealing with a matter of this sort, to take into consideration the quantum of remuneration allowed by the scale.

Solicitors: *H. A. Grey; Cooper & Sons.*

W. W. K.

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In re RITSON.
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[1897 R. 2095.]

Real Estate Charges Act, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113)—*Mortgage by Partner to secure Debt of Partnership—Devise of Mortgagor's Real Estate—Sufficiency of Partnership Assets.*

The Real Estate Charges Act, 1854 (Locke King's Act), does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership, when at the time of his death the partnership assets are sufficient to answer all the debts of the partnership.

Decision of Romer J., [1898] 1 Ch. 667, affirmed.

Appeal against the decision of Romer J. (1)

The question was whether the Real Estate Charges Act, 1854 (commonly known as Locke King's Act), applied under the following circumstances.

In August, 1894, John Ritson, who carried on business in partnership with his brother, T. S. Ritson, deposited with the bankers of the firm the title deeds to some real estate belonging to himself, as security for the repayment of all moneys then due and to become due by the firm to the bank, and by a memorandum of charge he charged all that real estate, and all other real estate belonging to him, or over which he had any disposing power, to which the deposited deeds or any of them related, with the payment of all moneys due or to become due as aforesaid.

By his will, dated June 21, 1897, John Ritson devised and bequeathed all his real and personal estate to trustees, of whom his wife was one, and whom he also appointed executors, upon trust for his wife for her life, and after her death upon trust as to certain specified real estate (including the real estate charged to the bankers) for his son Robert Ritson, absolutely, and as to all the residue of his real estate upon trust for sale, and to stand possessed of the proceeds of sale, and also of his personal estate, upon trust for the testator's children as therein men-

(1) [1898] 1 Ch. 667.

tioned. The will did not contain any words exempting the first-mentioned real estate from the charge to the bankers.

The testator died on September 13, 1897. He left surviving him his wife, his son Robert Ritson, and three other children, who were all infants. At the time of the testator's death the partnership were indebted to the bankers in respect of overdrafts.

The partnership assets were more than sufficient to answer all the partnership debts, including the debt to the bankers, which was about 17,000*l.*

An agreement had, with the sanction of the Court, been entered into between the testator's executors and T. S. Ritson that the debt due to the bankers should be paid by the executors and T. S. Ritson in the proportions in which the testator and he were entitled to the business.

This summons was taken out by the executors and trustees of the testator, against Robert Ritson and the testator's other children, asking for the determination (inter alia) of the question "whether such part of the amount due from the partnership to the bankers, and secured by the memorandum of deposit, as is payable by the estate of the testator ought to be paid out of his real estate mentioned in the memorandum of deposit, or out of his share in the assets of the partnership, and if the same ought to be paid out of such real estate that such real estate may be declared to be charged with the amount so payable."

Romer J. held that Locke King's Act did not apply, and made the following order: "It being admitted that the assets of the partnership business were sufficient for the payment of all partnership debts, including that due to the bank, this Court doth declare that such last-mentioned debt is payable out of such partnership assets, and not out of the assets of the testator, and that no part thereof is a charge on the real estate of the testator comprised in the said memorandum."

The infant children of the testator (other than the son Robert Ritson) appealed.

Christopher James (*Farwell, Q.C.*, with him), for the appellants. Sect. 1 of Locke King's Act applies. There is a

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question between the testator's real estate and his personal estate which of the two is primarily liable to pay this debt. The Act makes the real estate primarily liable, the testator not having expressed a contrary intention. In substance the testator's personal estate would be reduced if this debt is not thrown upon the real estate. The case is within the words of the Act. It can make no difference that the bank are not seeking to enforce their charge. A partnership is not a separate entity. If the partnership are the principal debtors, the testator's real estate being the surety, and the partnership assets pay the debt, it is really paid out of the testator's personal estate to the extent of his interest in the assets. The Act applies whether it is or is not necessary to have recourse to the charge on the real estate. Suppose that a man, who was not a partner, had two accounts at his bankers, one of which was covered by a mortgage of his real estate and the other was not. His executor could only get in from the bank the balance of the two accounts, and still the devisee of the real estate would have to bear the burden of the charge upon it. That is analogous to the present case. Sect. 9 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), makes a testator's estate liable after his death for the debts of the firm in which he has been a partner, and which have been incurred while he was a partner, but subject to the prior payment of his separate debts. If the testator's separate debts had been all paid his executors would have had no defence to an action by the bank for the administration of his estate.

Neville, Q.C., and *R. F. Norton*, for the plaintiffs and Robert Ritson, were not called upon.

LINDLEY M.R. I agree with Romer J. that when the facts are clearly understood it is plain that Locke King's Act does not apply. One of two partners created a charge upon his own real estate for a joint debt of the firm due to their bankers. Then he died, and the joint assets were at the time of his death sufficient to pay all the joint debts in full, including the debt to the bankers. The joint debts have to be paid primarily out of the joint assets, and the deceased partner could only dispose of

his interest in the surplus which would remain after payment of the joint debts out of the joint assets. This being so, was not Romer J. quite right in making the order which he has made? It seems to me that the order is absolutely right. The learned judge said (1): "The case, therefore, is not one 'between the different persons claiming through or under the deceased' within the meaning of the words of the Act. The only right of the executors is to have paid over to them the testator's share of the surplus assets of the partnership. What the devisee says is that the partnership assets are primarily liable to discharge the mortgage debt, and he is insisting that they ought to be made to bear it just in the same way as the surviving partner could have insisted on the partnership assets being applied to pay off partnership debts. If the surviving partner had done that, I fail to see how, when he had done so, the executors would have had any right to make the devisee account." I entirely agree with this. If the joint estate had not been sufficient for the payment of the joint debts it would have been quite another thing, and I say nothing about that. The present case does not come within the scope of the Act nor indeed within its language when it is properly understood.

CHITTY L.J. I am of the same opinion, and for the reasons which have been given by the Master of the Rolls and Romer J. The debt secured by the charge was the joint debt of the firm, and at the time of the testator's death the joint assets were sufficient to pay all the joint debts. The testator's interest in the joint assets was only his share of the surplus after payment of the joint debts. So there is in reality no charge upon his real estate. I agree, therefore, that there is not, within the words of the Act, any dispute "as between the different persons claiming through or under the deceased." The fallacy of the argument for the appellants is that it assumes the testator's estate to consist of that of which it does not in fact consist.

VAUGHAN WILLIAMS L.J. I entirely agree. Locke King's Act applies where there are "different persons claiming through

(1) [1898] 1 Ch. 669.

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or under the deceased person." In order that the Act may apply there must be a difference between two sets of persons claiming under the testator as to the incidence of a liability affecting his estate. Where there is no such difference, the Act can have no application; and there is no such difference in the present case. The joint estate is solvent, and there can be no question as to the incidence of the mortgage debt on the testator's personal estate. No liability can fall on either his real or his personal estate in respect of that debt, and there is, therefore, no difference between the devisee and the legatees.

Solicitors: *Speechly, Mumford & Rodgers, for Hayton & Simpson, Cockermouth.*

W. L. C.

C. A. 1898 *Nov.* 25, 26, 28; *Dec.* 9.

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[1897 W. 682.]

Mortgage—Priority—Notice—Further Advances after Notice of Second Mortgage—Covenant to make Further Advances—Life Interest—Trust over on Alienation—Words of Futurity—Retrospective Operation—Voluntary Settlement by Mortgagor after Mortgage.

Held, by the Court of Appeal, that the doctrine of *Hopkinson* v. *Rolt*, (1861) 9 H. L. C. 514, that, after notice of a subsequent incumbrance, a first mortgagee cannot, as against that incumbrancer, tack to his debt further advances made by him to the mortgagor, applies to further advances made in pursuance of an obligation or covenant on the part of the first mortgagee entered into at the time of the first mortgage.

A settlement contained a trust for payment of the income of the trust fund to A. for life "or until he shall assign, charge or incumber, or affect to assign, charge or incumber" the same:—

Held, by the Court of Appeal, that under the circumstances this trust had not a retrospective operation so as to include past acts.

The owner of a life interest in personal estate, who had already mortgaged it, mortgaged it a second time to two persons, his uncles, who had no notice of the first mortgage. One of the conditions of the second mortgage was, that the mortgagor should make a settlement of his life interest, so that that interest should be made determinable on alienation by him, with a trust in that event for the application of the income, at the discretion of the trustees, for the maintenance, support or benefit of the settlor, his wife (if any) and children or remoter issue, and his sisters and their children or remoter issue, and a settlement to that effect was executed

contemporaneously with the execution of the second mortgage. At the date of the second mortgage the first mortgagee had not given notice of his mortgage to the trustees of the will which created the life interest, and he did not give them notice until nine months afterwards, before which time notice of the second mortgage and of the settlement had been given to them. Notice of the first mortgage was given to the second mortgagees about five weeks after the notice to the trustees.

Held, by the Court of Appeal, that the uncles were entitled, in respect of their original advance and all further advances made by them to the nephew before they received notice of the first mortgage, to priority over the first mortgagee, but that the settlement must be treated as voluntary, and that the first mortgage was entitled to priority over it.

Decision of Kekewich J., [1898] 1 Ch. 488, reversed.

APPEAL against a decision of Kekewich J. (1)

Under the will, dated February 25, 1889, of his father, who died on March 5, 1892, the defendant Walter Williams was entitled for his life to the income of the father's trust estate.

By a deed dated December 24, 1895, the defendant Walter Williams assigned his life interest under his father's will, and also a policy of assurance upon his own life, to F. W. West (the plaintiff) by way of mortgage for securing the payment of 600*l.*, with interest thereon from the expiration of a year from the date of the mortgage. This deed contained a covenant by the mortgagor that, during the continuance of the security, he would not charge, incumber, assign, convey, release or otherwise deal with his interest under the will.

It was also agreed that until December 24, 1896, or until there had been some breach of covenant on the part of the mortgagor, the plaintiff should not give notice of his security to the trustees of the father's will.

Notice of this mortgage was not in fact given by the plaintiff to the trustees until January 8, 1897.

By a memorandum of charge of the same date as the mortgage, Walter Williams charged his interest under his father's will in favour of the defendant F. Temple, to secure the payment of 150*l.* with interest, but subject to the mortgage to the plaintiff. Notice of this charge was not given to the trustees of the will.

On April 2, 1896, Walter Williams, in breach of his covenant

(1) [1898] 1 Ch. 488.

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with the plaintiff, executed a mortgage of his life interest in favour of his uncles, the defendants P. A. Williams and J. W. Williams. This deed contained a recital of the father's will; a recital that the mortgagor, having contracted heavy liabilities, had applied to the mortgagees to assist him by advancing to him the sum of 2297*l.*, and also the sum of 200*l.* per annum during a period of five years from February 15, 1896, for his personal maintenance, which the mortgagees had (subject as to the said sum of 200*l.* per annum to the conditions or limitations expressed in the indenture of settlement thereinafter recited) agreed to do, upon having the repayment thereof, with interest, secured in manner also thereinafter appearing, and on condition of the mortgagor executing the said indenture of settlement thereinafter recited; and a recital that, by a settlement already prepared, and intended to bear even date with, but to be executed immediately after, the mortgage, the mortgagor had assigned his equity of redemption in his interest under the will to trustees, upon certain trusts, and that the mortgagees had by the same settlement covenanted with the mortgagor for payment to him in the events therein mentioned of the annual sum of 200*l.*; It was witnessed that, in pursuance of the agreement, and in consideration of the sum of 2297*l.* then paid by the mortgagees to the mortgagor, he covenanted with the mortgagees to pay to them on demand the sum of 2297*l.*, with interest thereon in the meantime at the rate of 4 per cent. per annum, and also any further sum or sums of money which, prior to such demand, should have been advanced by or become due to the mortgagees (other than for interest) under their covenant in the settlement, together with interest thereon at the rate aforesaid, and also, so long as any principal sum should remain due under the mortgage deed after such demand as aforesaid, to pay to the mortgagees interest thereon at the rate aforesaid half-yearly. And it was also witnessed that, for the considerations aforesaid, the mortgagor, as beneficial owner, thereby assigned to the mortgagees his life interest under the will, subject to a proviso for redemption by the mortgagor or by any person deriving title under him, on payment to the mortgagees of the sum of 2297*l.* and interest, and of such further

sum or sums (if any) advanced by the mortgagees under their covenant in the settlement or the mortgage deed, with interest.

The settlement of even date was made between the defendant Walter Williams, of the first part; the defendants P. A. Williams and J. W. Williams, of the second part; and the defendants Taylor & Mière, of the third part. After a recital of the effect of the will, and that Walter Williams, being pressed for money wherewith to discharge certain debts which he had contracted, and certain charges which he had created on his interest under the will, had applied to his uncles, P. A. Williams and J. W. Williams, to assist him, which they had agreed to do upon (amongst other things) his executing the settlement thereinafter contained: a recital of the mortgage of even date; and a recital that, except as thereinbefore mentioned, there was no incumbrance affecting the life interest of Walter Williams under the will; and that the defendants P. A. Williams and J. W. Williams had agreed to enter into the covenant on their part thereinafter contained: It was witnessed that, in further pursuance of the agreement, and in consideration of the premises, and of the covenant on the part of P. A. Williams and J. W. Williams thereinafter contained, the defendant Walter Williams, as settlor, thereby assigned his life interest under the will to the defendants Taylor & Mière, in trust for the defendant Walter Williams during his life, or until he should assign, charge or incumber, or affect to assign, charge or incumber the same, or some part thereof, &c., and after the determination of that trust during his life, in trust during the remainder of his life, or during such shorter period as the trustees should in their absolute discretion think fit, to apply the same for the maintenance, support or benefit of the settlor, his wife (if any) and children or remoter issue, and his sisters and their children or remoter issue. And P. A. Williams and J. W. Williams thereby covenanted with Walter Williams that, if he should, within eight weeks after February 15, 1896, leave England, and proceed to some other country out of Europe of which the covenantors should approve, and should remain in that country for a period of five years from the date of the settlement, and should not assign, charge, &c., his

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interest under his father's will, and should not be a party to any proceedings for administering his father's estate without the consent in writing of the trustees of the settlement, then the covenantors, or the survivor of them, would pay to him for the said period of five years the annual sum of 200*l.*, by quarterly payments to be made through bankers nominated by the covenantors.

On July 7, 1896, notice of the mortgage and settlement of April 2, 1896, was given to the trustees of the will, but at that time neither the defendants P. A. Williams and J. W. Williams, nor the defendants Taylor & Mière, had any notice of the plaintiff's mortgage, and in fact, as already stated, the trustees of the will did not receive notice of that mortgage until January 8, 1897.

Subsequently, on February 15, 1897, the plaintiff wrote to the defendants P. A. Williams and J. W. Williams, offering to redeem the mortgage of April 2, 1896, but the offer was refused. This was the first notice which those defendants had of the plaintiff's mortgage.

The defendant Temple gave no notice to the trustees of the will of his charge.

P. A. Williams and J. W. Williams made several payments to Walter Williams on account of his annuity in pursuance of their covenant in the settlement, and they claimed that as, at the date of the execution of their mortgage, they had no notice of the plaintiff's mortgage, their mortgage constituted a first charge on Walter Williams' life interest, not only for their original advance, but also for all further advances made by them under their covenant.

This action was brought by the plaintiff to enforce his security by foreclosure or sale; for a declaration of the priorities of the several mortgages; for redemption, if necessary, of the mortgages of the defendants P. A. Williams and J. W. Williams, and of the defendant Temple; and for consequential relief. The plaintiff admitted the priority of the mortgage of P. A. Williams and J. W. Williams, so far as regarded the original advance of 2297*l.*, and all sums advanced by the uncles under their covenant before February 15, 1897, when they for

the first time had notice of the plaintiff's mortgage; but he contended that his mortgage had priority over the uncles as regarded any advances made by them under their covenant after that date.

The defendant Temple by his defence admitted the plaintiff's priority, and submitted to act as the Court should direct.

Kekewich J. held that the uncles were entitled to priority over the plaintiff in respect of their original advance and of all advances made by them at any time under their covenant; and that the settlement had priority over the plaintiff's mortgage. His Lordship also held that the plaintiff's mortgage operated to determine the nephew's life interest under the settlement.

The plaintiff and the defendant Temple appealed.

Bramwell Davis, *Q.C.*, and *Wright Taylor*, for the appellant. The principle of *Hopkinson* v. *Rolt* (1) applies, and Kekewich J. was wrong in holding that the covenant of the uncles to make further advances to the mortgagor distinguished the present case from that. After notice of the plaintiff's security the uncles could not obtain priority over him for any further advances which they might make to the mortgagor.

There is no reported case in which the words "until he shall assign" have been held to refer to a past assignment. *Manning* v. *Chambers* (2), on which the learned judge below relied as the leading authority on the point, proceeded, as appears from the argument (3), solely upon this, that it was the settlor's intention to benefit the cestuis que trust, and not to benefit their creditors, whom he had no intention whatever of benefiting. *Seymour* v. *Lucas* (4), *Samuel* v. *Samuel* (5), and other cases of the same class, proceed precisely on the same lines.

[LINDLEY M.R. referred to *Metcalfe* v. *Metcalfe*. (6)]

There the Court of Appeal declined to extend the doctrine of *White* v. *Chitty*. (7) The intention of the settlor here was certainly not to catch a past life interest, and the words shew

(1) 9 H. L. C. 514.
(2) (1847) 1 De G. & Sm. 282.
(3) Ibid. 285.
(4) (1860) 1 Dr. & Sm. 177.
(5) (1879) 12 Ch. D. 152.
(6) [1891] 3 Ch. 1.
(7) (1866) L. R. 1 Eq. 372.

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no intention to overreach an existing incumbrance. The words, which are clearly words of futurity, must be confined to their natural meaning. It is impossible to say that the mortgagor is not enjoying the interest he has assigned to the plaintiff.

[CHITTY L.J. He is not in the beneficial enjoyment.]

He is in the enjoyment of his life interest subject to the plaintiff's mortgage. The life interest did not in fact determine: it is the same interest which is comprised in the plaintiff's mortgage. The learned judge was wrong in deciding that the words of futurity must be stretched so as to include a past assignment. No doubt that has been so held in cases on wills and voluntary settlements where the testator or settlor was master of the situation; the ratio decidendi of those cases was to give effect to the intention of the testator or settlor, so as not to leave the person he intended to benefit penniless.

Another ground for claiming the priority of the plaintiff's mortgage over the settlement is that the settlement was really voluntary and cannot defeat the plaintiff's mortgage: if necessary, leave to amend by pleading the statute 27 Eliz. c. 4, should be given; *Phipps* v. *Lord Ennismore*. (1)

[LINDLEY M.R. We cannot give leave to amend.]

Warrington, *Q.C.*, and *Sargant*, for the defendants P. A. Williams and J. W. Williams, the mortgagor's uncles. The settlement of April 2, 1896, is entitled to priority over the plaintiff's mortgage, of which no notice was given to the trustees before the execution of the settlement.

The settlement was not voluntary: by it the uncles bought the right to require that their nephew should deal with his life interest in a particular way.

[CHITTY L.J. Could not the nephew himself have redeemed the mortgage to the uncles?]

No; for he had parted with the equity of redemption.

[LINDLEY M.R. He had an interest subject to the mortgage, that is, in the equity of redemption.]

But he himself parted with the equity of redemption. The bargain by the uncles with him was, "We will not enter into this transaction at all unless you assign your life interest so as

(1) (1827) 4 Russ. 131.

to make it inalienable." If the life interest had not been made inalienable, then, no doubt, he would have had a right to redeem; but he cannot now get rid of the settlement by redeeming the mortgagees.

As to the construction of the settlement, the ratio decidendi of *Manning* v. *Chambers* (1), and that class of cases, is that the true object of the transaction is to secure to the person in question the personal enjoyment of the property. That is what the uncles were seeking to do here: what they bought was the right to provide that their nephew should have the personal enjoyment of the property assigned; but, if that object failed, then that his wife and children should have that personal enjoyment. The settlement cannot destroy the uncles' mortgage, because it is expressly made subject to it. As to *Hopkinson* v. *Rolt* (2), the rule there laid down does not apply, for the payments by the uncles were not voluntary, but were made under a definite obligation (3) into which they entered. The uncles had no constructive notice of the plaintiff's mortgage.

[LINDLEY M.R. That is really admitted.]

The most important point to them is the priority of the settlement. As to this, the principle of *Dearle* v. *Hall* (4) applies. That principle is, that when a mortgagee takes a mortgage from an equitable owner, and does not give notice of his mortgage to the trustees of the mortgaged fund or chose in action, he by his abstention enables his mortgagor to obtain a false and delusive credit. He enables the mortgagor to represent to a mortgagee subsequent in time that he is the unincumbered owner of the trust fund or chose in action, when it is in fact already incumbered, and by reason of this conduct he must, though his mortgage is prior in date, be postponed to the mortgagee whose security is of later date. Looking at the transaction in its commercial aspect, the uncles ran the risk of losing their money altogether if the mortgagor died within the five years. They were not secured by a policy of insurance. Regarding the plaintiff simply as a creditor of Walter Williams, there was ample consideration for the settlement in the advance

(1) 1 De G. & Sm. 282.
(2) 9 H. L. C. 514.
(3) 9 H. L. C. 534, 540.
(4) (1828) 3 Russ. 1.

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of money made by the uncles to him. Regarding the plaintiff as an incumbrancer of Walter Williams, the plaintiff deliberately agreed not to give notice to the trustees, and on the principle of *Dearle* v. *Hall* (1) he must be postponed to the uncles.

[LINDLEY, M.R. Can a mortgagor settle his equity of redemption on himself to the prejudice of his creditors? Can this hocus-pocus with the uncles make any difference?]

The uncles have a right to insist upon their bargain, for which they gave valuable consideration.

[LINDLEY M.R. No doubt they have, so far as their own pecuniary interest is concerned.]

It is submitted that they are entitled to insist on their bargain entirely.

On the construction of the determinable life interest given to Walter Williams by the settlement, *Manning* v. *Chambers* (2) might apply if there had been no express reference in the settlement to "certain charges." But the forfeiture clearly cannot apply to the mortgage to the uncles, for the life interest which is mortgaged to them is expressly settled subject to their mortgage. It is only a settlement of the equity of redemption, and the forfeiture cannot apply to it. This argument applies equally to the other charges. Though the settlement is not expressly made subject to those charges, it must in fact have been subject to them. "Certain charges" means charges of which the mortgagees had notice. It is admitted they had no notice of the plaintiff's mortgage. But, if the life interest has determined, the covenant by the uncles to pay the annuity has not come to an end. They are still under an obligation to pay the annuity to Walter Williams, and *Hopkinson* v. *Rolt* (3) does not apply.

[LINDLEY M.R. In order to support further advances must there not be not only a covenant to make them, but also a covenant to receive them? See the judgment of Lord Blackburn in *Bradford Banking Co.* v. *Briggs*. (4)]

Walter Williams is not merely mortgagor; he is also a cestui que trust under the settlement, which was the consideration for

(1) 3 Russ. 1.
(2) 1 De G. & Sm. 282.
(3) 9 H. L. C. 514.
(4) (1886) 12 App. Cas. 29.

the annuity of 200*l*. If he could redeem the mortgage the settlement would still remain in force.

Butcher, Q.C., and *A. R. G. Jennings*, for the trustees of the settlement. The duty of the trustees is to defend the interests of their cestuis que trust, other than Walter Williams, who is a party to the action. The plaintiff deliberately elected not to give notice of his security to the trustees, and to rely only on his mortgagor. He must accept the consequences of *Dearle* v. *Hall*. (1)

It may well be that a mortgagor cannot by a voluntary settlement defeat his creditors. But this settlement was in reality made by the uncles. They bargained for it when they advanced their money. Suppose they had purchased the equity of redemption out and out, and had then settled it, the settlement would have been perfectly valid. The actual settlement was made in pursuance of a bargain with the uncles, and must be equally valid.

[CHITTY L.J. In the settlement Walter Williams conveys "as settlor."]

That was done in order to introduce the covenants which, under the Conveyancing Act, 1881, are implied by the use of those words. Walter Williams, in fact, gave up a great deal, and this was the consideration for the advance of money by the uncles.

[LINDLEY M.R. It was really a settlement for his benefit.]

It was in substance made by the uncles.

[CHITTY L.J. The plaintiff does not seek to set aside the settlement; he only wants to gain priority over it.]

As to the construction of the forfeiture clause, and the application of *Manning* v. *Chambers* (2), regard must be had to the scope and object of the whole instrument. The object was to secure, so far as was possible, the personal enjoyment of the life interest by Walter Williams. The subject-matter of the settlement was the equity of redemption, subject to the mortgage to the uncles and to any other charges of which they had notice. Consequently, the words of forfeiture can have no application to those charges. The mere fact that the charge

(1) 3 Russ. 1. (2) 1 De G. & Sm. 282.

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was executed prior to the settlement can make no difference, but the words, though literally they apply only to the future, will cover the prior charge: *Metcalfe* v. *Metcalfe*. (1) The "other charges" necessarily take priority over the settlement. The covenant applies in form only to the period during which the uncles would have to pay the 200*l*. a year.

Bramwell Davis, Q.C., in reply.

[LINDLEY M.R. You may confine your reply to the question of the effect of *Hopkinson* v. *Rolt* (2) and *Bradford Banking Co.* v. *Briggs* (3), where Lord Blackburn (4) explained *Hopkinson* v. *Rolt*. (2)]

It is admitted then that the life interest under the settlement is subject to the plaintiff's mortgage. But it is submitted that the whole settlement is also subject to that mortgage. The plaintiff is entitled to priority over the settlement. Otherwise he might be defeated by an assignment of the life interest now, and a consequent forfeiture. Walter Williams was entitled to put a stop to any further payments by his uncles and to redeem them, and the plaintiff stands in his shoes. The right of the mortgagees to make further advances would then have been at an end. There was no covenant by the mortgagor to receive further advances. The plaintiff offered to redeem, though he did not actually tender the money; but the defendants refused redemption altogether. The mortgagor's own conduct prevents him from enforcing the covenant.

Cur. adv. vult.

1898. Dec. 9. LINDLEY M.R. I agree in the judgment which Chitty L.J. is about to read, but I wish to add a few words with regard to *Hopkinson* v. *Rolt*. (2) A first mortgagee, whose mortgage is taken to cover what is then due to him, and also further advances, cannot claim the benefit of his security for further advances in priority to a second mortgagee of whose mortgage he had notice before the further advances were made. This rule was ultimately established in the well-known case of *Hopkinson* v. *Rolt*. (2) In that case the first mortgagee had

(1) [1891] 3 Ch. 1.
(2) 9 H. L. C. 514.
(3) 12 App. Cas. 29.
(4) Ibid. 36.

not agreed to make further advances. We have to consider whether the same rule applies when he has agreed to do so. Kekewich J. has held that it does not. This point is of great general importance, and I have carefully considered it, and have come to a conclusion different from that of the learned judge. *Hopkinson* v. *Rolt* (1) was commented upon and explained by the House of Lords in *Bradford Banking Co.* v. *Briggs* (2) and in *Union Bank of Scotland* v. *National Bank of Scotland.* (3) These three cases shew very clearly that the principle which underlies the rule established in *Hopkinson* v. *Rolt* (1) is simply this, that an owner of property, dealing honestly with it, cannot confer upon another a greater interest in that property than he himself has. The rule rests on no technicality of English law; it is based on the plainest good sense, and it is as much the law of Scotland as the law of England. When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it, and create another mortgage subject only to the first. Nor can any one who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has. On the other hand, the first mortgagee has no right to restrain the mortgagor from borrowing money from some one else, and from giving him a second mortgage, subject to the first. Even if the first mortgagee has agreed to make further advances on the property mortgaged to him, the mortgagor is under no obligation to take further advances from him and from no one else, and if the mortgagor chooses to borrow money from someone else, and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them. A plea of exoneration and discharge before breach would be a good defence at law to an action by

(1) 9 H. L. C. 514. (2) 12 App. Cas. 29.
(3) (1886) 12 App. Cas. 53.

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the mortgagor against the first mortgagee for not making further advances. If, notwithstanding his release, the first mortgagee makes further advances, with notice of a second mortgage, he is in no better position than any one else who does the like.

For these reasons I have come to the conclusion that the rule laid down in *Hopkinson* v. *Rolt* (1) does apply to the advances made by the uncles to their nephew after they had notice of the plaintiff's mortgage.

As regards the rest of the case, I cannot usefully add anything to the judgment of my brother Chitty L.J., which I have read, and in which I concur.

CHITTY L.J. This appeal is by the plaintiff and the defendant Temple against parts of the judgment of Kekewich J. It raises two principal points: first, whether the defendants P. A. Williams and J. W. Williams (whom I will call the uncles) are entitled to tack to their security the advances made by them to the defendant Walter Williams, their nephew, after February 15, 1897, the date when the uncles first had notice of the plaintiff's security. The plaintiff by his pleading claimed priority over the mortgage to the uncles. But at the trial it was admitted that the uncles must have priority for all advances made by them up to February 15, 1897, and this is also admitted by the notice of appeal. The second point relates to the question whether the plaintiff is entitled to redeem the uncles' mortgage, and, if he redeems, to a judgment over for foreclosure against the trustees of the settlement made contemporaneously with the mortgage to the uncles.

There is no dispute between the parties on the facts. The deeds and the facts are stated in the report (2) to which I refer with some additions. [His Lordship gave a short summary of the facts, and continued :—]

The judgment under appeal is to the following effect. First, it declares that the uncle's mortgage, including all sums advanced and to be advanced under the covenant in the settlement, and also the settlement itself, have priority over the

(1) 9 H. L. C. 514. (2) [1898] 1 Ch. 488.

plaintiff's mortgage, and dismisses the action with costs, as against the uncles and the trustees of the settlement. It includes, therefore, in the uncles' priority not merely (*a*) the sums which the uncles had advanced up to February 15, 1897, but (*b*) also sums advanced subsequently to that date down to the judgment, and (*c*) all sums which they might thereafter advance under the covenant. Further, it excludes the plaintiff from any right of redemption. Secondly, it goes on to declare that, by virtue of the plaintiff's mortgage made before the date of the settlement, the life interest of the nephew under the settlement had determined, and the discretionary trust had come into operation. And, thirdly, it makes a foreclosure decree against the remaining defendants only, namely, the nephew and the defendant Temple, intended apparently to be confined to the policy of assurance, although not so confined in express terms.

Now, on the first point there arises a question of considerable general importance. It is this. When a mortgagee is seeking to tack advances made by him after notice of a subsequent incumbrance, is the principle of *Hopkinson* v. *Rolt* (1) excluded by the circumstance that the mortgagee has entered into a covenant to make the advances? In *Hopkinson* v. *Rolt* (1) there was no such covenant, and the subsequent advances which the mortgagee was not allowed to tack were merely voluntary. In this respect the case before us differs. *Hopkinson* v. *Rolt* (1) was considered by the House of Lords in *Bradford Banking Co.* v. *Briggs* (2) and in *Union Bank of Scotland* v. *National Bank of Scotland.* (3) In *Bradford Banking Co.* v. *Briggs* (2), a limited company had stipulated for a "first and permanent lien" on its shares for any money which might become due to it from a shareholder. The banking company, with notice of this agreement for a lien, made advances on shares. The shareholder subsequently became indebted to the company, and the company claimed priority for these subsequent debts, incurred after notice given by the bank of their security, and they contended that the bank,

(1) 9 H. L. C. 514. (2) 12 App. Cas. 29.
(3) 12 App. Cas. 53.

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knowing the terms on which the shares were issued, and taking with notice, could not set up their charge as against the company. This contention was negatived by the House of Lords. The principle on which these decisions are founded appears to me to be, that a mortgagee cannot obtain a charge on property which is no longer the mortgagor's to charge, and which the mortgagee knows at the time when he makes his further advance is no longer the property of the mortgagor. No charge arises for a further advance until it is actually made. This principle is plain and simple, and is based on natural justice and fair dealing. If this be the principle (which I think it is), the covenant to make further advances creates no difficulty: and for this reason; the covenant is to make the further advance on the security of the property, and, inasmuch as the mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant. It is hardly necessary to add that no action lies for specific performance of any agreement to make a loan. The result, then, thus far is, that the uncles are not entitled as against the plaintiff to tack any advance which they made to the nephew after February 15, 1897.

On the second point the question is, whether the plaintiff is entitled to redeem the uncles' security. I cannot entertain any doubt on this question. I think he is, not merely because he is a person deriving title from the nephew under the express words of the proviso for redemption in the uncles' mortgage deed, but because he is plainly the second incumbrancer on the nephew's interest under the will. Then there arises the question whether, if he redeems the uncles' mortgage, he is entitled to a foreclosure decree against the trustees of the settlement, who represent in this action all the persons claiming beneficially under the trusts of the settlement, other than the nephew himself, who, although he was properly served and put in a defence, did not appear at the trial. The uncles are not beneficiaries under the settlement. The trustees contend that the true effect of the settlement and the mortgage to the uncles is, that the uncles purchased the nephew's life interest under the will for value, without notice of the plaintiff's security, and then settled

the interest thus purchased. But the answer to this contention is to be found in the deeds themselves. The contention is inconsistent with the form and the substance of the deeds. They contain no trace or suggestion of any such purchase; the settlement is not made by the uncles, nor by their direction, as beneficial owners; the settlor is the nephew and the nephew alone. This is clearly expressed on the face of the settlement. The consideration for the settlement is another matter. The consideration was the then present advance and the conditional covenant by the uncles to make further advances for the nephew's maintenance. It was for this consideration that the nephew agreed that he would make the settlement. All that he could effectually settle, as against the plaintiff and the defendant Temple, was his own interest, which was, as he knew, subject to the securities which he had created in their favour. It is noticeable that, although in the mortgage to the uncles he assigns "as beneficial owner," which under the Conveyancing Act imports all the usual mortgagor's covenants, including that against incumbrances, he assigns in the settlement "as settlor," which imports merely a covenant for further assurance. He, therefore, does not covenant in the settlement that his interest which he settles is free from incumbrances. This fortifies the conclusion (which I think is otherwise plain) that he settled merely his interest, whatever it was. The settlement, therefore, is of no validity against the plaintiff. The plaintiff, if he redeems the uncles' mortgage, is consequently entitled to the usual decree for foreclosure against the trustees and the defendants Temple and the nephew, for what the plaintiff pays to the uncles on redeeming them, and for what is due to the plaintiff under and by virtue of his own security.

In these circumstances the question whether the nephew has forfeited his life interest under the settlement becomes comparatively immaterial. It was a question of importance according to the view which the learned judge took. Now it is material only on the question, whether the nephew should be let in to redeem under that part of the judgment which

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relates to foreclosure by the plaintiff. It is an important question between the nephew and the other beneficiaries under the settlement. The language of the trusts and of the covenant for future advances which is contained in the settlement itself is identical. It points to the future only—it is "until he shall assign or incumber," and so forth. These words must have the same meaning in the trusts and in the covenant. This was admitted at the bar, and was rightly admitted. If the covenant had stood alone, there could be no question that the words of futurity could not be construed as relating to the past. Words, which grammatically refer only to the future, have been construed in a settlement of this kind made by will or otherwise as including the past, in order to give effect to the intention manifested. It is sufficient to refer to *Metcalfe* v. *Metcalfe*. (1) There is no authority applying any such doctrine to the case of a condition in a covenant. In the present case there is a recital in the settlement that the nephew had created "certain charges" (without specifying what they were) on his interest under his father's will. In the face of this recital it seems to me that it cannot be held that there was an intention to make past charges a ground of forfeiture. Any such supposed intention is directly negatived. There is no obligation laid upon the nephew to apply the money which he obtained from his uncles in paying off the prior charges. If those charges formed a ground of forfeiture, then the life interest of the nephew ceased the moment it arose, and the covenant never became operative.

With regard to the costs, I think that the incumbrancers should add their costs of the action, including the costs of the appeal, to their securities. This is the general rule when a case of disputed priorities arises out of the acts or conduct of the mortgagor. The plaintiff offered to redeem before suit, but he confined his offer to the original advance by the uncles. He withdrew his offer by claiming priority in his statement of claim. Still he asked to have the priorities ascertained, and offered to redeem if he had not the first security.

(1) [1891] 3 Ch. 1.

As to the claim of the defendant Temple, who joins in the appeal, the facts are not sufficiently before us to enable us to decide anything specifically as to his rights. By his defence he submitted to act as the Court should direct. The question (if it arises) between him and the uncles, as to their right to tack as against him their subsequent advances, will depend on the time when he first gave notice of his security. But any such question is one between co-defendants, and therefore one which the Court does not decide at the trial, unless it involves any right of the plaintiff, which is not the case here, or unless the defendants concur in asking for a decision. Any question between the uncles and the trustees of the settlement as to the uncles' right to tack their advances made after the 15th February, 1897, as against the trustees, is also a question between co-defendants; but it may not be improper to state my opinion that those advances clearly have priority over the settlement.

The order will be to the following effect. The judgment of Kekewich J. should be discharged. There must be a declaration of the priority of the uncles' security in accordance with what I have above stated. Then there must be the usual redemption decree, ascertaining what is due to the uncles under and by virtue of their security for their original advance, and their subsequent advances down to February 15, 1897, including their costs as mortgagees, and their costs of the action and the appeal. If the plaintiff does not redeem he will stand foreclosed, and his action will be dismissed in the usual manner. In the event of the plaintiff redeeming, he will have a foreclosure decree over against the trustees of the settlement, the defendant Temple, and the defendant the nephew, for what the plaintiff pays to the uncles and for what is due to him on his own security. Only one time should be limited for redemption, unless there is some special reason why successive times should be limited. If there is any special reason, it should be mentioned now. It does not seem necessary to work out the rights of the parties beyond what I have stated. Liberty to apply must be reserved, under which a further order can be

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made should it become necessary. There will, I apprehend, be no difficulty in drawing the order substantially in conformity with the above sketch. If any difficulty should arise, it may be mentioned to the Court before the order is passed.

VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Weekes & Co.; Mackrell & Co., for Wragge & Co., Birmingham; Mann & Taylor.*

W. L. C.

ASTLEY *v.* NEW TIVOLI, LIMITED.

NORTH J.
1898
Dec. 9, 16.

[1898 A. 1811.]

Company — Articles of Association — Construction — "Place of Profit" — "Under."

A trustee of a covering deed relating to debentures issued by a company, who was nominated and paid by the company, *held* to be the holder of a "place of profit under the company," and therefore incapable of acting as a director.

THE plaintiff sued as a director of the New Tivoli, Limited. The defendants were the company and the three other directors.

The plaintiff claimed an injunction to restrain the defendants from excluding him from, or preventing him from acting as, a director of the company. The motion for an interlocutory order was treated as the trial. The defendant directors alleged that the plaintiff had ceased to be a director under the articles of association of the company by reason of holding an office or place of profit under the company.

The material Articles of Association of the company were the following:—

Art. 64. "Any debentures, debenture stock, or other instruments for securing the payment of money, issued by the company, may be . . . . secured by any mortgage or mortgages in favour of trustees or otherwise as the company may think fit. Such trustees may be paid such remuneration as the company may think fit."

Art. 104. "The office of a director shall be vacated—(*a*) if he accepts or holds any other office or place of profit under the company (except that of managing director). . . ."

Art. 126. "If any of the directors shall be called upon to perform extra services, or to make any special exertions in going or residing abroad for any of the purposes of the company or the business thereof, the company shall remunerate the director or directors so doing either by a fixed sum or by a percentage of profits, or otherwise as may be determined by agreement between such directors and the board. Such remuneration

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may be either in addition to or in substitution for his or their share in the remuneration as hereinbefore provided."

Art. 127 gave the company power to enter into contracts with the directors.

Art. 129. "The management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by the statutes expressly directed or required to be exercised or done by the company in general meeting, but subject, nevertheless, to any regulations from time to time made by the company in general meeting; provided that no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

Art. 130. Among other powers given to the directors in detail without prejudice to their general powers it was provided by clause 13, "They may give to any director, manager, officer, or other person employed by the company a commission on the profits of any particular business or transaction, or a share in the general profits of the company, and such commission or share of profits shall be treated as part of the working expenses of the company."

The company was registered in May, 1891.

The first directors were the plaintiff, who was chairman, and two other persons.

In 1895 the then existing debenture debt and a mortgage debt were paid off by means of money raised for the purpose by an issue of fresh debentures. These debentures were issued in accordance with a resolution of the directors, subject to the terms of and secured by a deed of trust of September 3, 1895, between the company as borrowers and Henry Newson Smith and the plaintiff (two of the directors) as trustees for the debenture-holders. The deed provided that the statutory power of appointing new trustees should be vested in the company, provided that the trustee or trustees appointed should be a person or persons approved of by a resolution of debenture-

holders. The deed also provided for the payment of the remuneration of 105*l.* a year to the trustees between them, and "if and when the security hereby constituted shall become enforceable the trustees shall be paid such a sum as may be voted as remuneration to the trustees or surviving trustee by a majority of the debenture-holders" in manner provided.

In 1896 the plaintiff retired by rotation from his office of director, and at a meeting, held August 5, 1896, he was re-elected. In November, 1898, the question of his qualification having been raised, his co-directors took steps to exclude him, and he commenced this action. His co-directors subsequently called a meeting of shareholders for December 12, 1898, for the purpose of removing him from his office of director. This motion was opened on December 9, and stood over as part heard till Friday the 16th. In the meantime the meeting of shareholders was held, and a resolution passed to remove the plaintiff from his office of director.

Swinfen Eady, Q.C., and *Rowden*, for the plaintiff. A trustee of a covering deed can in no sense be said to be an officer of the borrowing company. Nor can he be said to be the holder of a place of profit under the company. His principal duty is to the debenture-holders; to some extent he is a trustee for both parties; but he is subject to the directions of no one, and therefore under no one. The object of the disqualifying article is to prevent a person being in the false position of being master and servant too. There are other provisions in the articles which shew that the object is not to prevent his getting extra remuneration for extra work.

Even if by taking the trusteeship he became disqualified, he was not disqualified from sitting when subsequently elected at a time he already held the position of trustee. In the case of *Dawson* v. *African Consolidated Land and Trading Co.* (1) it was held that an undischarged bankrupt might be elected to and hold the office of director of a company where the articles provided that a person should cease from being a director if he became bankrupt.

(1) [1898] 1 Ch. 6.

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Buckley, Q.C., and *Mark Romer*, for the defendants. It is not shewn that at the meeting where the plaintiff was re-appointed director the fact that he had become disqualified was disclosed. He vacated his office not only by accepting but by holding a place of profit. The object of the disqualification was to prevent the directors making paid places for themselves. The company here fixed the remuneration and were the pay-masters; the trusteeship was a place of profit under the company. The trustee's duty was equally to the debtors as to the creditors.

Swinfen Eady, Q.C., in reply.

NORTH J. In my opinion it is reasonably clear that the trusteeship is a place of profit under the company. I feel a little more difficulty in saying that it is an office under the company for this reason. The covering deed with which we have to deal is in the ordinary form to secure debentures. There are two trustees, as is generally the case, and those persons are trustees for the debenture-holders, though to a certain extent also, as Mr. Buckley says, they are trustees for the company, which remains the owner of the equity of redemption; but those trustees might be nominated, as they often are, or selected by the persons who are going to lend their money, and be wholly foreign to the company and its directors. I do not think that it can be said that the trustees of a covering deed—a deed primarily for the benefit of creditors—are necessarily officers of the company. I do not think that merely as such trustees they are officers of the company, or could have been held responsible for misfeasance under s. 165 of the Companies Act, 1862, or under s. 10 of the Act of 1890. They hold a position in which they are trustees of the property vested in them first of all for the debenture-holders, and subject to the claims of the debenture-holders, they hold it for the company; but I do not think they can properly be said to be officers under the company. The phrase here in art. 104 is, "The office of director shall be vacated if he accepts or holds any other office or place of profit under the company." The 64th article provided for debentures being issued by the company

and being secured by mortgage. It says they may be secured by any mortgage or mortgages in favour of trustees or otherwise as the company may think fit. Such trustees may be paid such remuneration as the company may think fit. The whole power to say whether there shall or shall not be trustees, or what other arrangement shall be made, rests solely with the company, and the power to decide and the right to decide what remuneration, if any, is to be paid to the trustees is vested in the company in the same way. Then how does the company act? The company acts through its directors. [His Lordship read art. 129, and continued:—]

The company, therefore, is represented by the directors—the directors are the company, and they are the persons to do the acts which are to be done by the company, namely, to fix the character and the form of the covering deed, if any, to decide whether there are to be trustees or not, and, if there are trustees, what remuneration they shall have. Then s. 104 comes in, to which I have just referred, as to the vacation of the office of a director, which is vacated if he accepts or holds any other office or place of profit under the company. I think that the meaning really is to prevent the directors, who are acting as the agents of the company, doing anything by which a director can continue a director, and yet accept or hold an additional office or place of profit under the company. It is intended to prevent the directors having power to accumulate in themselves various places of profit. A director is not to be a master and servant at the same time. Is the position of trustee of that deed a place of profit under the company? It is a case in which the trustee has been selected in the first instance, and his remuneration has been fixed, by the company—by the directors who have selected two of themselves to fill that position. Then the office of director is to be vacated if he holds a place of profit under the company. I think a man who has been selected by the company—by the directors—to fill the position of trustee of a covering deed on the terms of receiving from the company, out of the coffers of the company, regular payment of so much a year during the time that he continues to fill that office, in addition to his payment as

NORTH J. 1898 ASTLEY v. NEW TIVOLI, LIMITED.

director, is occupying a place of profit. He is putting in his own pocket the salary that is paid by and comes from the company of which he is a director. In my opinion, a director in that position is holding a place of profit under the company, and therefore his directorship is vacated. If he already was a director when he accepted the trusteeship, the directorship would have been vacated by the acceptance; but if he was trustee, as is the case here, at the time when he was last appointed to be a director of the company, I think that article applies which says that his office of director is vacated if he holds any place of profit under the company. He is holding such place of profit, and he is incapacitated by art. 104 from being a director at the same time. Under those circumstances, I think the view which was taken by the other directors in the autumn of 1898, that the plaintiff's directorship had been vacated by his holding a place of profit under the company, was correct. Therefore the action fails, and must be dismissed with the usual results.

Solicitors: *Lewis & Lewis; Nicholson, Graham & Graham.*

D. P.

In re OWEN'S PATENT.

STIRLING J.

1898
Nov. 8.

Patent—Amendment of Specification — Pending Action or Proceeding for Revocation—"Disclaimer, Correction, or Explanation"—Patents, Designs, and Trade Marks Act, 1883–1888 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *ss.* 18–20.

The word "disclaimer" in s. 19 of the Patents, Designs, and Trade Marks Act, 1883, must be read strictly, and not as including "correction or explanation."

Where, therefore, an action for infringement or proceeding for revocation of a patent is pending, the Court has no power under s. 19 to order that the patentee shall be at liberty to apply at the Patent Office for leave to amend his specification by way of correction or explanation.

Liberty to apply can only be given where the proposed amendment is by way of "disclaimer."

THIS was an application by summons, under s. 19 of the Patents, Designs, and Trade Marks Act, 1883, by William Owen, who was the registered owner of a patent for an invention of "an improved manufacture of artificial stone, marble, and the like," asking for an order that he might be at liberty to apply at the Patent Office for leave to amend his specification. The patent was granted on June 5, 1896.

In 1897 a petition for revocation of the patent was presented by C. A. Peters, whose particulars of objection alleged (inter alia) want of novelty, want of utility, insufficiency of specification, various inaccuracies and errors in the statements and directions of the specification, also want of subject-matter, and that the alleged invention was not capable of being carried into practice. The summons came before the judge in chambers on June 13, 1898, when the hearing was adjourned in order that the applicant might shew what amendment he proposed to make. He thereupon filed an affidavit in which he stated that he now knew that certain statements in his specification relating to degrees of temperature at which his process was carried out were inaccurate, and he desired to correct them by making certain alterations. The summons having been adjourned into Court now came on for hearing.

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Moulton, Q.C., and *J. C. Graham*, for the applicant. It must be admitted that the amendment desired is really a correction, and not strictly by way of "disclaimer" if that word be construed narrowly. But under s. 18 amendment is allowed by way of "disclaimer, correction, or explanation," and we submit that the omission of the words "correction or explanation" from s. 19 was merely a slip in the Act, and that a wide meaning should be given to the word "disclaimer" as used in s. 19. (1) There is no reason why amendment by way of disclaimer should be allowed pending proceedings, while amendment by way of correction or explanation is not. "Disclaimer" must be taken to include "explanation and correction": *In re Lang's Patent* (2); *In re Gaulard and Gibbs' Patent* (3); see also *Gaulard* v. *Lindsay*. (4) It was never intended that a patentee should have no right of amendment when his attention is called to a defect by proceedings for revocation. The gist of s. 19 is that the Court may order that the patentee shall be at liberty to apply for leave to amend. The amendment cannot be without leave. When the applicant gets to the Patent Office he can ask for such amendment as he desires. If the word "disclaimer" be narrowly construed there is practically no machinery for amendment at all during the pendency of an action or proceeding for revocation. When an application is made to the Court for liberty to apply, sub-s. 10 of s. 18 is suspended. Why is it not got rid of for all purposes? Having regard to the provisions of s. 18, sub-s. 10 can only be read as declaring that some of the preceding sub-sections do not apply.

Bousfield, Q.C., and *Buckmaster*, for the respondent, the petitioner. Prior to the Act of 1883 disclaimer only was

(1) Sect. 19 of the Patents, Designs, and Trade Marks Act, 1883, provides that, "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

(2) (1890) 7 Rep. Pat. Cas. 469.

(3) (1887) 5 Rep. Pat. Cas. 189.

(4) (1888) 38 Ch. D. 38.

allowed. Sect. 18 goes further, and the Legislature no doubt thought that the privilege conferred by that section ought not to be extended to cases where proceedings were pending. The object of allowing disclaimer is shewn by *Ralston* v. *Smith*. (1) In no case has anything beyond disclaimer been allowed pending litigation. The suggestion of a slip in the Act is negatived by the fact that s. 18 has been amended and not altered in this respect.

In re Lang's Patent (2) and *In re Gaulard and Gibbs' Patent* (3) were both cases of disclaimer. Chitty L.J. in *In re Armstrong's Patent* (4) made some observations which support our contention. The difference of language in the two sections may have been intended to obviate possible fraud on the part of patentees who might be tempted to insert misleading statements in their specifications and seek to amend as soon as proceedings for revocation were taken.

STIRLING J. The language of the 19th section of the Act, contrasted with that of the two sections which precede and follow it—the 18th and 20th sections—is somewhat remarkable. Sect. 18 begins (sub-s. 1) by providing that "An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction or explanation, stating the nature of such amendment and his reasons for the same." Sub-sects. 2 to 9, inclusive, are consequential on that; and then, in the original Act, there stood this clause (sub-s. 10): "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending." By the Amendment Act of 1888 another sub-s. 10 was substituted for that, which runs thus: "The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending." Sect. 19 is limited to amendment by way of disclaimer, and the words "correction or explanation," which

(1) (1865) 11 H. L. C. 223.
(2) 7 Rep. Pat. Cas. 469.
(3) 5 Rep. Pat. Cas. 189.
(4) (1897) 14 Rep. Pat. Cas. 747, 754.

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are in s. 18, sub-s. 1, are not found there. Sect. 20 also deals with amendments, and is this: "Where an amendment by way of disclaimer, correction or explanation has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

The contention on the part of the applicant is that a slip has been made in the Act, and that the word "disclaimer," which alone occurs in s. 19, ought to be read as having the same meaning as if the words "correction or explanation" were added, though those words are not found in the 19th section. It has been admitted very candidly by Mr. Moulton that the amendment which he has brought under my notice is not by way of disclaimer, if the word "disclaimer" is to be construed in its narrow meaning, but is really an application for leave to amend by way of correction; and his junior, Mr. Graham, though he has not expressed himself in precisely the same language, has been unable to shew me what disclaimer in the strict sense is to be found in the proposed amendment.

It is said this matter has been discussed before the law officers and before the Courts, and that the wider construction has been put upon it, and I have been referred to various cases in which the matter has been brought under the consideration of the law officers and of the Courts in support of that proposition.

The practice is said to have been settled, so far as the law officers are concerned, by the case of *In re Lang's Patent*. (1) That was a case in which an application was made to amend by way of disclaimer, and the law officer, Sir E. Clarke, dealing with the argument upon the sections, expresses himself thus (2): "My jurisdiction here is under the combined operation of the 18th and 19th sections of the Patents Act, and I have no doubt that when, under the 19th section, the Court or judge orders that the patentee shall be at liberty to apply to the Patent Office for leave to amend his specification by way of disclaimer,

(1) 7 Rep. Pat. Cas. 469. (2) 7 Rep. Pat. Cas. 471.

the provisions of s. 18 do apply as if that section stood without the three words in it, 'correction or explanation.'" He is there dealing with an objection which apparently was taken founded upon the peculiar language of sub-s. 10 of s. 18 and s. 19. Sect. 18, sub-s. 10, as amended by the Act of 1888, says that the foregoing provisions in that section do not apply when and so long as any proceeding for revocation, for example, is pending. Sect. 19 provides that in an action and in a proceeding for revocation of a patent the Court or a judge may at any time order that the patentee shall be at liberty to apply at the Patent Office; but it goes no further, and, as the Court has merely power to direct that in the meantime the trial or hearing of an action shall be postponed, a proceeding for revocation is left pending, and as, according to sub-s. 10, none of the provisions of the earlier clauses in s. 18 would apply, there is no machinery for making an application to the Patent Office. Consequently it would seem as if, the function of the Court being discharged by giving liberty to apply, there is no way of making the application which the Court orders. Well, the Court and the law officers have got over that by saying that sub-s. 10 must be read subject to a qualifying proviso contained in s. 19, and that when liberty has been given an application may be made to the law officers in accordance with s. 19. But does that enable an application to be made otherwise than for an amendment by way of disclaimer? The learned law officer answers "No"; in his opinion the amendment is limited to disclaimer alone. He continues thus: "My jurisdiction in the main depends on the 18th section, and I do not doubt that I have power to allow any amendment, whether of the letterpress of the specification, or of the drawings, or by way of adding drawings, if drawings have not in the first instance been appended to the specification, necessary to define the disclaimer which it is desired to make." That is to say, that when an application is made for a real disclaimer there is power to amend the body of the specification or the drawings by giving all necessary information and explanation for the purpose of defining more accurately the disclaimer; and in that sense the patent which came before the law officer on that occasion was one which it was sought to

STIRLING J. amend by way of disclaimer. It seems to me that that is quite clear from the report and from the subsequent portions of the judgment, which it is not necessary for me to quote at length.

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I was also referred to the case of *In re Gaulard and Gibbs' Patent* (1), in which an application was made for leave to amend by way of disclaimer, the disclaimer being really the excision of claim 3 of the specification, and upon that certain portions of the body of the specification were allowed to be struck out or altered.

These cases do not help the present application. But the very point seems to have been present to the mind of Chitty L.J. in the case of *In re Armstrong's Patent.* (2) There, in dealing with an argument which had been addressed to the Court, he said this: "The amendment that could be made, even if leave were granted, would merely be by way of disclaimer; that being clear under s. 18 (and also under s. 19), which uses the three terms, and shews that the term 'disclaimer,' which alone occurs in the 19th section, is so used advisedly." Therefore, it appears to have been the opinion of the Lord Justice in that case that the word "disclaimer" in s. 19 should not receive the extended meaning which is sought to be attached to it here, and that only an application for leave to amend by way of disclaimer ought to be granted.

There is no express decision on the point; but the authorities appear to me to be all one way—that is to say, in favour of reading the word "disclaimer" in s. 19 strictly. That is the conclusion to which, independently of authority, I myself should have come. Consequently, seeing the nature of the amendments proposed in the present case, it seems to me the present application must be refused with costs, such costs to be costs in the petition for revocation, and to be the petitioner's in any event.

Solicitors: *Ashurst, Morris, Crisp & Co.; J. & M. Solomon.*

(1) 5 Rep. Pat. Cas. 189. (2) 14 Rep. Pat. Cas. 754.

G. A. S.

In re WASDALE. BRITTIN *v.* PARTRIDGE.

STIRLING J.
1898
Nov. 8, 9; *Dec.* 8.

[1898 W. 1769.]

Assignment—Chose in Action—Priority—Reversionary Trust Fund—Notice to existing Trustees—Death or Retirement of Trustees.

An assignee of a reversionary interest in a trust fund who has given notice to all the trustees in existence at the time of his assignment is under no obligation to give any further notice, and is consequently entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees.

Timson v. *Ramsbottom*, (1837) 2 Keen, 35, and *In re Hall*, (1880) 7 L. R. Ir. 180, distinguished.

Ward v. *Duncombe*, [1893] A. C. 369, discussed.

UNDER the will of Matthew Wasdale, who died in 1856, Edward Nix Watson became entitled to a reversionary interest in the proceeds of sale of certain lands devised to trustees upon an imperative trust for conversion.

By an indenture dated February 9, 1871, Edward Nix Watson assigned this interest for value to John Samuel Partridge, who in the same month gave notice of the assignment to Dingley Askham Brittin and Robert Barton, then the sole trustees of the testator's will.

In June, 1881, the survivor of these trustees died, and thenceforth down to 1896 his widow and executrix acted as trustee of the will of Matthew Wasdale. On July 1, 1896, the plaintiffs were duly appointed trustees of that will.

By an indenture dated February 26, 1897, Edward Nix Watson assigned his interest under the will of Mr. Wasdale (still reversionary) to Louisa Bell, widow, by way of mortgage to secure repayment of 400*l*.

On February 28, 1897, Mrs. Bell gave notice of her incumbrance to the plaintiffs, the trustees of Wasdale's will.

Subsequently, the interest of E. N. Watson fell into possession, and, it being claimed both by Partridge and by Mrs.

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Bell, the present summons was taken out by the plaintiffs to determine the priority between them.

Tebbutt, for the trustees.

R. F. Norton, for Partridge. Partridge gave notice to all the trustees who were living at the date of our incumbrance, and his priority cannot be affected by the fact that the then existing trustees have since died and others have been appointed, to whom he has not given notice: *Low* v. *Bouverie* (1); *Ward* v. *Duncombe*. (2) In *Timson* v. *Ramsbottom* (3) the assignee had omitted to give notice to a trustee who was in existence when he took his assignment.

Eustace Smith, for Mrs. Bell. A person who takes an assignment of a reversionary trust fund must, in order to entitle himself to priority, keep the trustees for the time being informed of the assignment. The law is thus stated in White & Tudor, 7th ed. vol. i. at p. 122: "If notice be given to all the trustees who afterwards die or retire, and new trustees are appointed, such trustees will not incur any liability if they distribute the trust funds before receiving any notice, and a subsequent incumbrancer who gives notice to them will gain priority over a former incumbrancer who merely gave notice to their predecessors." *Phipps* v. *Lovegrove* (4) and *Hallows* v. *Lloyd* (5) are quoted in support of that proposition. The law is stated to the same effect in Lewin on Trusts, 10th ed. p. 866. An incumbrancer is there advised "not only to give notice to *all* the trustees in the first instance, but to watch as well as he can the changes in the state of the trust, and to take care, by repeating his notice, that there is never a set of trustees of whom there is not at least *one* who has notice of his charge." The doctrine of acquiring priority by notice was invented as a protection against fraud, the object of giving notice to the trustees being to enable a puisne incumbrancer to obtain information of any prior incumbrances: *Dearle* v. *Hall* (6); *Loveridge* v. *Cooper* (6); *Foster* v. *Cockerell*. (7) This principle

(1) [1891] 3 Ch. 82, 104.
(2) [1893] A. C. 369, 394.
(3) 2 Keen, 35.
(4) (1873) L. R. 16 Eq. 80.
(5) (1888) 39 Ch. D. 686.
(6) (1828) 3 Russ. 1.
(7) (1835) 3 Cl. & F. 456.

is affirmed by Lord Herschell in *Ward* v. *Duncombe.* (1) The question of priority depends on the question whether the trustees had at the time when notice was given of the second incumbrance notice of the first one ; if they had not, the priority of the first incumbrance is lost : *Timson* v. *Ramsbottom.* (2)

[STIRLING J. That case has been followed in *In re Hall.* (3)]

Norton, in reply.

Cur. adv. vult.

1898. Dec. 8. STIRLING J. (after stating the facts as above). The assignment of Partridge is earlier in point of date, and is consequently entitled to priority unless the subsequent assignee establishes that he has a better title in equity.

It has been held that where, as here, a fund consisting of personal estate is vested in trustees, a subsequent assignee who gives notice of his assignment to the trustees has a better title in equity than a prior assignee who has entirely omitted to give notice of his : *Dearle* v. *Hall* (4) ; *Foster* v. *Cockerell.* (5) If, however, one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, the earlier assignee does not lose his priority : *Ward* v. *Duncombe.* (6)

It has been further held in *Timson* v. *Ramsbottom* (2) and *In re Hall* (3) that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice was given. In the latter case the Vice-Chancellor of Ireland gives as a reason that it is the fault of the earlier assignee that he did not give notice to both trustees, and refers to *Meux* v. *Bell.* (7)

So far the decisions have gone. I am now asked to hold that an assignee who has given notice to all the trustees in existence at the time of his assignment is not entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all these trustees, and

(1) [1893] A. C. 369, 378.
(2) 2 Keen, 35.
(3) 7 L. R. Ir. 180.
(4) 3 Russ. 1.
(5) 3 Cl. & F. 456.
(6) [1893] A. C. 369.
(7) (1841) 1 Hare, 73.

STIRLING J. who gives notice of such assignment to the new trustees. That, as I think, goes beyond the decisions in *Timson* v. *Ramsbottom* (1) and *In re Hall* (2), for in both those cases the assignee omitted to give notice to a trustee in existence when he took his assignment.

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The principle upon which the doctrine of the Court as to notice is founded was the subject of much discussion in the House of Lords in the recent case of *Ward* v. *Duncombe.* (3) Lord Herschell, after referring to the judgments in *Dearle* v. *Hall* (4) and *Loveridge* v. *Cooper* (4), says (5): "It is impossible, I think, to read these judgments without seeing that the leading consideration which induced the Court to lay down the rule that he who gives notice has a better equitable right than a prior incumbrancer who has given no notice was this, that any other decision would facilitate fraud by the cestui que trust, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one, and who might have done everything they could to render that title secure." Lord Macnaghten examines those decisions at great length with a view of ascertaining the principles on which they are founded, and he then proceeds (6): "My Lords, I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle* v. *Hall.* (4) The rule is settled law. But it seems to me that when your Lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given, I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case." His Lordship then criticises the decision of Lord Langdale in *Timson* v. *Ramsbottom* (1), observing that the case was compromised on appeal, and he continues as follows: "As Westbury L.C. says in *Willes* v. *Greenhill* (7), 'It is well established,

(1) 2 Keen, 35.
(2) 7 L. R. Ir. 180.
(3) [1893] A. C. 369.
(4) 3 Russ. 1.
(5) [1893] A. C. 378.
(6) Ibid. 394.
(7) (1861) 4 D. F. & J. 150.

whether rightly or wrongly, that upon assignments or mortgages of equitable interests in property held by trustees, the duty devolves upon the assignee or mortgagee to give to the trustees notice of the assignment or incumbrance.' But it may be that when an assignee or mortgagee has once discharged that duty he has done all that the rule requires of him, and that for the rest the law holds as Lord Cairns lays it down"—Lord Macnaghten is there referring to a passage he had previously cited from *Shropshire Union Railways and Canal Co.* v. *Reg.* (1)—"and that he is not, on a change of trustees, to be deprived of his pre-existing equitable title by the diligence or by the happy thought of a subsequent incumbrancer. Certainly, I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable titles." These observations of Lord Macnaghten are of the greatest weight, and in my judgment it would be imposing an unreasonable burden on assignees to hold that they are under an obligation to give notice to every new trustee, or are to be treated as guilty of neglect to take reasonable precautions if they omit to do so. I think, therefore, that the title of Partridge must prevail.

Solicitors: *H. E. Watts, for Day & Watts, St. Ives, Hunts; Munk & Co.; Prince & Co.*

(1) (1875) L. R. 7 H. L. 496, 506.

H. B. H.

STIRLING J. 1898 Nov. 10; Dec. 10.

URBAN DISTRICT COUNCIL OF TWICKENHAM *v.* MUNTON.

[1898 T. 270.]

Street—Paving, &c., Expenses—Apportionment—Alteration of Scheme—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8, 11, 12, 13.

An urban authority resolved to do certain paving, &c., works under the Private Street Works Act, 1892, with respect to a street in their district, and by a further resolution approved their surveyor's specification, plans, and provisional apportionment of expenses, comprising the whole of the street. One of the owners objected to the apportionment on the ground that part of the street was repairable by the inhabitants at large. The justices allowed the objection, and amended the plans and provisional apportionment by limiting them to the remaining portion of the street, without, however, directing any notice of the amendment to be given to the other owners. Another owner, who had had no notice of the amendment, declined to pay his apportioned share of the expenses on the ground (1.) that it was for the urban authority to determine whether the works should extend to the whole or part of the street; (2.) that he had been deprived by the action of the justices of the opportunity of objecting to the amended scheme. Upon an application by the urban authority for a charge on his premises:—

Held, (1.) that the justices in limiting the scheme to a portion of the street had acted within their jurisdiction, and that the amended scheme took effect as though it had been approved ab initio by the urban authority; (2.) that it was not necessary that any further notices should be given to the owners, unless the justices in the exercise of their discretion so directed; and the Court granted the application.

Adjourned Summons.

This was a summons claiming a declaration that the plaintiffs were entitled under s. 13 of the Private Street Works Act, 1892, to a charge on certain houses and lands vested in the defendants and situate in Montpelier Road, Twickenham, for 27*l.* 10*s.* and 28*l.* 9*s.* 6*d.*, the apportioned amounts of expenses incurred by the plaintiffs in executing private street works under s. 6 of the above-mentioned Act, together with interest, and for consequential relief. The Private Street Works Act, 1892, was duly adopted for the district of Twickenham, and came into operation on February 22, 1893. On June 27, 1895, the plaintiffs resolved with respect to Montpelier Road to do the various

street works mentioned in s. 6 of the Act, with the exception of lighting. On July 25, 1895, the plaintiffs passed the following resolution: "That the specifications, plans, sections, estimate, and provisional apportionment prepared by the council's surveyor with reference to the making up of Montpelier Road, Twickenham, be and they are hereby approved." The specifications, &c., mentioned in the resolution related to the whole of Montpelier Road. The resolution was duly published, and copies thereof served, in accordance with s. 6, sub-s. 3, of the Act, on the defendants and other owners of premises affected thereby. The defendants gave no notice of any objection, but another owner did give such notice, and on January 1, 1896, the matter having been brought before a court of summary jurisdiction, the justices held that a part of Montpelier Road was a street repairable by the inhabitants at large, but that the remainder was a private street within the meaning of the Act, and they amended the plan, estimates, and apportionment so as to limit the operation thereof to the latter portion of Montpelier Road. The justices did not direct any fresh notices to be served, and no further notices were served either on the defendants or any other person shewing the alteration in the works proposed to be carried out. On October 24, 1896, the council's surveyor made his final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the amended provisional apportionment. On December 19, 1896, notices of the final apportionment were served on the several owners of the premises affected thereby, including the defendants. The defendants gave no notice of objection to the final apportionment. The defendants were willing to pay the sums mentioned in the summons provided that the whole of Montpelier Road was repaired; but they objected to the repair of the portion to which the scheme of the plaintiffs had been limited by the justices as being detrimental to them so long as the rest of the road remained unrepaired.

Macmorran, Q.C., and the *Hon. Frank Russell*, for the plaintiffs.

STIRLING J.

1898

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R. Cunningham Glen, for the defendants. 1. The justices in limiting the works to a part of the street have exceeded their jurisdiction. The plaintiffs, as provided by s. 6 (1), have

(1) The material provisions of the Private Street Works Act, 1892, are as follows:—

"5. In this Act if not inconsistent with the context . . . . the expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large.

"6—(1.) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do" the private street works therein enumerated, "and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street.

"(2.) The surveyor shall prepare, as respects each street or part of a street,—

"(*a*) A specification of the private street works referred to in the resolution, with plans and sections (if applicable);

"(*b*) An estimate of the probable expenses of the works;

"(*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act.

"Such specification, plans, sections, estimate, and provisional apportionment shall comprise the particulars prescribed in Part I. of the schedule to this Act, and shall be submitted to the urban authority, who may by resolution approve the same respectively with or without modification or addition as they think fit.

"(3.) The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in Part II. of the schedule to this Act, and copies thereof shall be served on the owners of the premises shewn as liable to be charged in the provisional apportionment within seven days after the date of the first publication. During one month from the date of the first publication the approved specifications, plans, and sections (if any), estimates, and provisional apportionments (or copies thereof certified by the surveyor), shall be kept deposited at the urban authority offices, and shall be open to inspection at all reasonable times.

"7. During the said month any owner of any premises shewn in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; (that is to say,)

"(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act;

"(*b*) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large;

resolved to make up the whole of the street, and that resolution still stands. The question whether the whole or a part of the street is to be made up is left entirely to the discretion of the authority, and in effect the justices have exercised the discretion reposed in the plaintiffs. Moreover, the resolution has not been in fact amended by the justices, though they have amended the plans. The original resolution to make up the street must be adhered to throughout until a resolution has been passed by the plaintiffs to make up a part of the street only.

"(*c*) That there has been some material informality, defect, or error in or in respect of the resolution, notice, plans, sections, or estimate;

"(*d*) That the proposed works are insufficient or unreasonable. . . ."

"8—(1.) The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The Court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The Court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given.

"(2.) No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever."

"11. The urban authority may from time to time amend the specifications, plans, and sections (if any), estimates, and provisional apportionments for any private street works, but if the total amount of the estimates in respect of any street or part of a street is increased, such estimate and the provisional apportionment shall be published in the manner prescribed in Part II. of the schedule to this Act and shall be open to inspection at the urban authority offices at all reasonable times, and copies thereof shall be served on the owners of the premises affected thereby; and objections may be made to the increase and apportionment, and if made shall be dealt with and determined in like manner as objections to the original estimate and apportionment."

[Sect. 12 provides for a final apportionment to be made after the completion of the works, and empowers the owners to object on the grounds therein mentioned. Sect. 13 gives the urban authority a charge on the premises included in the final apportionment for the sum finally apportioned.]

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2. No amendment can be made unless the persons whose interests are affected have been allowed an opportunity of objecting. The scheme of the Act implies that notices shall be given to the persons whose premises are chargeable where amendments are proposed affecting their interests.

The present proceedings are misconceived because all the steps required by the statute to create a charge have not been taken. Having regard to what has taken place, the final apportionment must be treated as a nullity: *Whitchurch* v. *Fulham Board of Works.* (1)

Macmorran, Q.C., in reply. The resolution referred to in s. 8 is not the preliminary resolution to make up the road in sub-s. 1 of s. 6, but the resolution approving the specification in sub-s. 2, and it is not necessary that that resolution should be amended in terms. Sect. 7 allows the provisional apportionment to be objected to on the ground that a part of the street is repairable by the public. Sect. 8 provides that that objection shall be brought before the justices, who have power to deal with all objections and to amend the specification and provisional apportionment. If the justices think the objection good, and that part of the street is not a private street, their proper course is to amend. By the same section the justices have a discretion to say whether or not any additional notices shall be sent.

Cur. adv. vult.

1898. Dec. 10. STIRLING J., after stating the facts and referring to ss. 3, 4, 5 (definition of "street"), 6, 7, 8, 11, 12, 13 of the Private Street Works Act, 1892, continued as follows. The defendants resist the summons on the following grounds:—

First it is said that the justices have exceeded their jurisdiction by taking upon themselves the function of the urban authority with whom rests the determination of the question whether the whole or part only of a street should be repaired. Undoubtedly s. 6, sub-s. 1, gives the urban authority the right to decide whether the whole or part of a street is to be repaired;

(1) (1866) L. R. 1 Q. B. 233.

and, in the present case, the plaintiff council did by resolution determine that the whole of Montpelier Road should be repaired. Sub-s. 2, however, provides that "the specification, plans, sections, estimate, and provisional apportionment . . . . shall be submitted to the urban authority, who may by resolution approve the same respectively with or without modification or addition as they think fit." In this case the approval was without modification or addition. Sub-s. 3 provides for due notice of the last-mentioned resolution being given to the owners of the premises shewn as liable to be charged, any one of whom may, by s. 7, take objection to the proposed works on the following amongst other grounds: "(*b*) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." Sect. 8 provides that such objections shall be dealt with by a court of summary jurisdiction, and also provides that "the Court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority."

Now here the Court did not quash the resolution, or the plans, sections, estimates, or provisional apportionments, but amended the plans, estimates, and apportionments, without, however, saying anything about the resolution. But it is to be observed that the Court was acting within its power; because the Act empowers the Court to quash or amend the resolution, plans, and other documents, or any of them; and, in point of fact, the resolution was in terms so framed by reference to the plans and estimates as not to require any verbal modification.

Now, upon the construction of the Act the jurisdiction of the court of summary jurisdiction to amend a resolution and the other documents, appears to me to exist in a case where the objection taken is that the street or part of the street is a highway repairable by the inhabitants at large, no less than when the objection is of any other nature specified in s. 7; and where the jurisdiction is exercised I can find nothing in the Act which renders it necessary that the urban authority should begin their proceedings de novo, or pass a resolution limiting the works to that part of the street which is not

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repairable by the public. So to decide would be, as it seems to me, to hold that the power of the court of summary jurisdiction is in such a case limited to quashing the resolution and the accompanying documents, and does not extend to amending them. I do not think that that is the true construction of the Act. I think that the amended resolution and plans and other documents were meant by the Legislature to take effect just as if they had been duly passed ab initio by the urban authority. In my judgment, therefore, the justices did not exceed their jurisdiction.

Secondly, it was contended that the defendants had been by these proceedings deprived of all opportunity of taking objection to the works now proposed to be executed. That is true; but s. 8 provides that the court of summary jurisdiction may, if it thinks fit, adjourn the hearing and direct further notices to be given. It was, therefore, within the power of the court of summary jurisdiction to direct notices to be given to the defendants; but it was not obligatory on the Court so to do. Plainly the Court had a discretion in the matter, and that discretion was exercised. It is not for me to say whether or not the discretion was properly exercised. All that I have to determine is whether the justices acted within their jurisdiction. I think that they did, and it appears to me that this objection also fails.

On the whole, I come to the conclusion that the plaintiffs are entitled to the Order which they ask, and that Order must be made accordingly.

Solicitors: *Ruston & Co.; Munton & Morris.*

H. B. H.

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Oct. 27, 28.

[1897 C. 4038.]

Mortgage—Real Estate—Life Policy—Mortgagee taking Possession of Real Estate—Statutory Title—Lapse of Time, Mortgagor barred by—Redemption Action—Right to Redeem Policy Separately—Analogy of Statute, Application of—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 7.

Where real estate and a life policy have been included in one mortgage to secure one indivisible sum, the mortgaged properties being subject to one and the same proviso for redemption, and the mortgagee has been in possession of the real estate for more than twelve years without any acknowledgment of the mortgagor's title, so that the mortgagor's right to redeem the real estate has become barred by s. 7 of the Real Property Limitation Act, 1874, his right to redeem the policy is also barred—not by analogy to the statute, but because, it having become impossible for the mortgagor to require a reconveyance of the real estate, it has become equally impossible, according to the rules regulating the administration of mortgages in a court of equity, for him to require a reassignment of the policy, the real estate and the policy together constituting one security for the debt.

By an indenture of mortgage dated July 1, 1869, and made between Joseph Charter and Sarah Charter his wife of the one part, and Job Watson of the other part, certain freeholds were by the first witnessing part conveyed to Watson in fee, "subject nevertheless to the proviso for redemption hereinafter contained." Then by a second witnessing part certain copyholds were covenanted to be surrendered to such uses as Watson should by deed appoint, and in default to the use of Watson, his heirs and assigns for ever, "subject to the proviso for redemption hereinafter contained." Then by a third witnessing part a policy of assurance on the life of Joseph Charter for 100*l.* in the Royal Insurance Company was assigned to Watson, his executors, administrators, and assigns, "subject nevertheless to the proviso for redemption hereinafter contained." Then followed a proviso for redemption of all the mortgaged premises in the usual form on payment to Watson on October 11, 1869, of 350*l.* with interest at 5 per cent. per annum, with a further proviso that if the principal and interest

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should not be paid on that day it should be lawful for Watson, his heirs, executors, administrators or assigns, immediately thereupon or at any time thereafter to enter upon and take possession of the freehold and copyhold hereditaments or the rents and profits thereof, and also the policy, and then or at any time thereafter to sell the same. Then followed a proviso that the said power of sale or any other provision thereinbefore contained should not in anywise prejudice or affect the mortgagee's right of foreclosure or otherwise as a mere mortgage of the freehold and copyhold hereditaments. The mortgage contained covenants by Joseph Charter for payment of the premiums on the policy and for keeping it on foot, with a proviso that in default Watson might keep it on foot and recover the costs thereof, with interest at 5 per cent. per annum, out of the premises. The copyholds were surrendered in accordance with the covenant. No interest under the mortgage was paid either by Joseph or Sarah Charter after 1871, and in 1872 Watson, the mortgagee, entered into possession of the freeholds and copyholds and received the rents. Previously to 1876 Joseph Charter made default in paying the premiums on the policy, and it had since been kept on foot by Watson and his executors out of the rents.

On September 16, 1881, Watson died, having made a will of which his widow, Charlotte Amelia Watson, was the present sole surviving executrix. She was now in possession of the freeholds and copyholds comprised in the mortgage.

On July 27, 1897, Joseph Charter died intestate, leaving the plaintiff, Sarah Charter, his widow, and the plaintiff, George William Charter, his heir-at-law, who was also his legal personal representative. Thereupon the defendant Charlotte Amelia Watson claimed to be entitled to payment of the 100*l.* assured by the policy on Joseph Charter's life. The plaintiffs, however, claimed, as mortgagors, to be entitled to redeem the policy, even if they were debarred from redeeming the freeholds and copyholds by reason of the mortgagee Watson and his representatives having remained in possession more than twelve years without any acknowledgment of the mortgagor's right to redeem, within the meaning of s. 7 of the Real Property Limi-

tation Act, 1874 (37 & 38 Vict. c. 57); and they asserted that the defendant Mrs. Watson and her predecessor in title had received rents and profits exceeding the amount of the mortgage debt. The plaintiffs accordingly brought this action against Mrs. Watson as mortgagee in possession, and the insurance company, claiming, as against the defendant Mrs. Watson, the usual account and inquiries in a redemption action, and redemption of the freeholds, copyhold, and policy, upon payment to that defendant of what, if anything, should be found due to her: and also claiming, as against both defendants, an injunction to restrain the insurance company from paying the policy money to the defendant Mrs. Watson until she should have furnished an account as aforesaid; a receiver of the policy money; and in the event of it appearing on taking the said account that less than 100*l.* was due on the mortgage, costs against the defendant Mrs. Watson.

The defendant, Mrs. Watson, delivered a defence pleading the Statutes of Limitation, especially the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7 (1), and alleging that the rents and profits received by her late husband and herself as successive mortgagees in possession had not been more than sufficient to keep down the interest on the mortgage debt. The plaintiffs having joined issue with the defendant Mrs. Watson, the action now came on for trial. The insurance company did not appear at the trial and were struck out as defendants.

E. P. S. Counsel, and *R. Bertrand Jackson*, for the plaintiffs. The Statutes of Limitation do not apply to a mortgage of a policy of insurance; they apply only to "land." This is a

(1) Sect. 7 provides that "When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him. . . ."

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mortgage of land as well as a policy, which is, in effect, assured as a separate or collateral security; and if the mortgagee elect to make himself owner of the land alone, without enforcing his collateral security, he must be held to have abandoned his right to the collateral security, at least at law: *Dyson* v. *Morris*. (1) The mortgagor is clearly entitled in equity to redeem the policy in the absence of any statute to the contrary.

Warrington, Q.C., and *T. Ribton*, for the defendant Mrs. Watson. We stand on our legal right. We took possession of the mortgaged real estate in 1872, so that the mortgagor's entire right under the mortgage became barred in 1884, and there has been no acknowledgment since. It is true that the Real Property Limitation Act, 1874, s. 7, which bars a mortgagor's right to redeem where the mortgagee has been in possession of the mortgaged land for twelve years without any acknowledgment in writing of the mortgagor's title, does not in terms apply to personal estate such as a policy, but we submit that the Court should apply the Act to personal estate by analogy. If the mortgagor is entitled to come here, after all this lapse of time, to recover the money due on his policy, he may compel the mortgagee to account for all the rents and profits of the real estate for which he may be accountable by the statute. The only way of avoiding that difficulty is to act by analogy to the statute. Prior to 3 & 4 Will. 4, c. 27, there was no limitation whatever to redemption actions, but still the Court applied to redemption actions in equity the same rules as were applicable to ejectment actions at law. This was discussed in *Hovenden* v. *Lord Annesley*. (2) The subject of equitable demands is dealt with by Lord Redesdale (3), who approved of what was said by Sir J. Jekyll in *Floyer* v. *Lavington*. (4) We rely on Lord Redesdale's observations as authority for the proposition that the Court ought, in the case of a purely equitable demand, such as the redemption of a policy, to apply to that demand the same rules as the Legislature has applied to the redemption of land. *Harrison* v. *Hollins* (5) is an authority to

(1) (1842) 1 Hare, 413, 423.
(2) (1806) 2 Sch. & Lef. 607, 630.
(3) 2 Sch. & Lef. 637.
(4) (1714) 1 P. Wms. 270.
(5) (1812) 1 S. & S. 471.

the same effect. So in *In re Lady Hastings* (1), the Statute of Limitations (21 Jac. 1, c. 16), s. 3, was applied by analogy to a debt which could be recovered in equity but not at law. Again, this is a stale demand, a kind of demand which it has always been the practice of the Court to discountenance. But we rely mainly on the fact that this policy is comprised in the same mortgage deed as the real estate, the whole of the properties forming one security; the policy is not a collateral, in the sense of its being a separate, security. It is impossible to apply to personal property a rule different to that applicable to real property when both are comprised in the same deed. The right to redeem the land having gone, the right to redeem the policy is gone also. We have at least a lien on the policy for the premiums, for we have paid them out of the rents, rents which belong to us.

Counsel, in reply. As to the cases cited by the other side, they deal only with the application of the statute to equitable interests by analogy to legal interests, but here we are dealing with two totally different classes of property, real property and personal property. In *Mellersh* v. *Brown* (2), where, the case being one of a mortgage of personalty, the Court was asked to act upon the analogy of the statute, Kay J. said (3) distinctly that it was impossible to apply to personal estate a statute dealing only with real estate.

KEKEWICH J. The novelty of the question falling for decision is certainly somewhat strange, seeing that mortgages which include freehold, copyhold, and leasehold estates, or some or one of them, and also chattels, and particularly policies of assurance, are extremely common. One would have thought that ere now the question would have arisen and been discussed and decided respecting the lapse of the equity of redemption as regards chattels and other like interests, where that equity was gone as regards freeholds, copyholds, or leaseholds. However, counsel have been unable—though obviously great attention has been paid to the case—to produce any authority

(1) (1887) 35 Ch. D. 94. (2) (1890) 45 Ch. D. 225.
(3) 45 Ch. D. 229.

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which bears at all directly upon the point; and there is none apparently to be found. Nor can I myself recall any case in my own experience or in the books where the precise point has ever arisen. The point arises very clearly here. It cannot be denied that owing to the lapse of time, and having regard to the Real Property Limitation Act, 1874, the plaintiffs are now debarred from insisting upon their right to redeem the freehold and copyhold hereditaments comprised in the mortgage of July 1, 1869. It is not denied that more than twelve years have elapsed since possession was taken by the mortgagee, and there is no acknowledgment in writing within the terms of the statute to keep alive the equity of redemption. But the mortgage deed contains this policy of insurance, and the question arises whether, as regards this policy also, the right to redeem is gone. I am asked to say that it is gone mainly on the ground that the Court ought to apply the analogy of the statute, and reference has been made to the well-known judgment of Lord Redesdale in the case of *Hovenden* v. *Lord Annesley* (1), where he accepts the application of the analogy.

The answer to that argument is the one which was given by counsel in reply, namely, that here I am not considering the application of the statute—which may be said only to affect legal interests—to equitable interests, but I am asked to apply by analogy a statute, which in distinct terms only touches land, to an entirely different property, that is to say, to a policy of insurance, which is personal estate; and I am asked to do so notwithstanding it is fairly admitted that there is no statute applying to such property as that. I think that if I were to attempt to apply the statute by analogy I should be doing something quite different from what Lord Redesdale did, and from what has been done by the Court of Chancery in England again and again. Lord Redesdale said in effect: We find a statute which does not purport to bind equitable interests, or in terms does not apply to equitable interests, but we will apply it by analogy, and so in dealing with equitable interests we will treat ourselves as bound by the statute which in terms only touches legal interests. It seems to me to be

(1) 2 Sch. & Lef. 607.

very difficult from that to argue that a statute which applies to land shall be applied by analogy to a policy of insurance. I do not see my way to act upon any such principle. To do so would be to create an analogy of my own, which I do not say is ill-founded, but is one that, being fully aware of the great danger of analogies, I hesitate to create on the present occasion.

Then it is said that the plaintiffs come here with a stale demand. [His Lordship then considered that point, and said he was not satisfied that there might not have been some conduct on the part of the defendant to render her answer of a stale demand insufficient, and that he should be reluctant, on the facts before him, to decide against the plaintiffs on that ground. His Lordship then proceeded :—]

I propose to deal with the case on a somewhat different footing, as raising a novel question, and strictly on principle. On reflection, I think the principle on which I propose to deal with it is sound. This is a mortgage of freehold and copyhold hereditaments, and of a policy of insurance. The fact that there are copyholds really makes no difference, except that it introduces a separate witnessing part. My conclusion would be the same if there were no copyholds at all, but only freeholds and the policy. The mortgage deed is dated July 1, 1869, and conveys the freeholds to the mortgagee in fee in the usual way, "subject nevertheless to the proviso for redemption hereinafter contained." But the proviso does not follow immediately, as there is another witnessing part which is a conveyance of the copyholds in the usual form of a covenant to surrender. These copyholds are also to be surrendered to the use of the mortgagee, his heirs and assigns, "subject to the proviso for redemption hereinafter contained." Again the proviso for redemption is postponed, because there is a third witnessing part containing the assignment of the policy. That is assigned to the mortgagee, his executors, administrators, and assigns, subject again "to the proviso for redemption hereinafter contained." Reading the deed down to that point, one sees, knowing what a mortgage deed is, that all these three properties are intended to form one security: you may call one or other collateral, if you please, and you use the term with perfect

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accuracy, but all together constitute one security. There is no principal security with another as surety for it. The properties are conveyed separately, and in that sense it is right to say that one is a collateral security to the other; but the proviso for redemption makes the meaning of the deed perfectly clear. [His Lordship read the proviso, and continued:—]

That is to say, if the money is paid—principal and interest—by the very day, then, according to the exigencies of the contract, there is to be reconveyance—not of the freeholds, or of the copyholds, or of the policy, but of the freeholds, the copyholds, and the policy, all in one lot; and it would be impossible for either party to say that redemption of the property could be completed without payment of the whole of the money secured by the mortgage and reconveyance of the whole mortgaged property. There is one indivisible security for one indivisible amount. I need not read the rest of the deed, because there are different provisions with regard to the several properties, including of course provisions for keeping up the policy, with power for the mortgagee to expend money for that purpose. How then is that proviso for redemption to be read?—bearing in mind that the clause which limits the time for payment and makes the conveyance absolute, and the property conveyed the property of the mortgagee unless the money is paid on the particular day named, has always been considered by courts of equity as not fixing a particular day once for all, but as constituting the transaction a mortgage and making the property a security only, and as providing that so long as the money is forthcoming when required and interest is paid in the meantime, the mortgagor is entitled to redeem.

Before the Statutes of Limitations a certain limit was laid down by the Court, but that was done away with by the Real Property Limitation Act, 1874, which provides that the right of redemption is not gone unless a certain time—twelve years—has expired without acknowledgment. But when that time has expired, then the right of the mortgagor has gone, and the mortgagee may retain the property strictly, whether at law or in equity. So that if the mortgagor has not paid the sum secured by a certain day, and there has been no subsequent

acknowledgment by the mortgagee, the result is, the money not having been paid, the right is gone. I have already pointed out that the right of redemption is not as to one part of the property, but as to the whole, and the result is that the right is gone as to the whole: it is gone as much as regards the policy of insurance as it is as regards the land; not because the right to redeem the policy is barred by statute or by applying the analogy of the statute, but because, it being impossible at law for the mortgagor now to require a reconveyance of the land, it is equally impossible for him to require a reassignment of the policy, the land and the policy being on one footing and being together the security for the debt. That seems to me to be entirely in accordance with the method upon which mortgages are administered in equity, and with what is intended in the books on equity.

Upon that ground it seems to me that the plaintiffs fail. They cannot now redeem the policy without paying the principal, interest, and costs due in respect of the whole debt. They cannot make the mortgagee accept the money as regards the land, because they are barred from their right of redemption as regards the land, and they cannot therefore redeem the policy either. It comes back to this: because the land and the policy make one security, and the plaintiffs cannot have back the land alone, they cannot have back the policy. That is in accordance with the method in which mortgages are administered in this Court, and I think this is a sounder view to take than to apply the statute by analogy, and therefore the plaintiffs' case fails.

There will be a declaration that, the Court being of opinion that the plaintiffs are barred by the statute from redeeming the freeholds and copyholds, they cannot redeem the policy, and there will be judgment for the defendant with costs.

The judgment was drawn up in the following form:—

"This Court, being of opinion that the right of the plaintiffs to redeem the freehold and copyhold hereditaments in the pleadings mentioned is barred and extinguished by the Real Property Limitation Act, 1874, and that therefore the plaintiffs are not entitled to redeem the policy of assurance in the

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pleadings mentioned, doth order that this action do stand dismissed out of this Court with costs to be taxed by the taxing master. And it is ordered that the plaintiffs, George William Charter and Sarah Charter, widow, do pay to the defendant Charlotte Amelia Watson the amount of her said costs when taxed."

Solicitors for plaintiffs: *Savory, Pryor & Blagden.*

Solicitor for defendant: *Frank Woodbridge, for Henry Watson, Bedford.*

G. I. F. C.

KEKEWICH J. 1898 *Nov.* 25; *Dec.* 3.

In re WHITEFRIARS FINANCIAL COMPANY, LIMITED.
In re REEVES & SON, LIMITED.

Practice—Procedure—Company—Contract—Memorandum in lieu of Contract, Filing of—Application for Relief—Rectifying Register—Motion—Summons—Shareholders, Application by some only—Forms of Order and Memorandum—Companies Act, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

An application under the Companies Act, 1898, s. 1, for leave to file a contract or a memorandum in lieu of a contract, may be made either by motion or summons, but preferably by summons, and if by summons it should be heard in open Court and not in chambers, following the better practice on applications to rectify the register of shareholders.

The application, if made by shareholders, may be made by some only, and not necessarily by all, of the shareholders affected.

Where a memorandum in lieu of a contract is approved by the Court and ordered to be filed with the Registrar of Joint Stock Companies under sub-s. 4, it is not necessary to file a copy of the order as well as the memorandum, but the memorandum should state on the face of it that it has been approved by the Court and directed to be filed by the order.

Forms of order and memorandum under the Act.

THE Whitefriars Financial Company, Limited, was incorporated on April 6, 1893, under the Companies Acts, 1862 to 1893, with a nominal capital of 5000*l.* in 1*l.* shares, the whole of which were taken up and issued as fully paid up.

In 1897 the business of the company had increased to such an extent that the directors found it necessary to raise further capital, and for that purpose they proposed a scheme of reconstruction whereby the members were to receive, for each 1*l.* share in the old company, two shares of 1*l.* each in the new company intended to be formed, subject to a premium of 5*s.*

and credited with 15*s.* paid on each share; and to those members who dissented from the scheme it was proposed to pay 2*l.* in cash for each 1*l.* share held by them.

In January, 1898, a notice was sent to all the shareholders of the old company convening an extraordinary general meeting for February 2, 1898, for the purpose of passing special resolutions to carry out the scheme. At this meeting special resolutions were passed for winding up the old company and forming a new company under the same name with a capital of 50,000*l.* in 1*l.* shares, and for the issue of new shares as above stated. Part of the scheme of reconstruction was that the new company should acquire as a going concern the business of the old company and all its assets, including reserve fund and liabilities, and that the consideration for the transfer should be 10,000*l.* in cash, or 1*l.* shares paid up to the extent of 15*s.* each and with a liability of 5*s.* each, at the option of the liquidator of the old company; but no contract in writing was filed with the Registrar of Joint Stock Companies shewing the transaction, it being considered by the directors and their advisers that no such registration was necessary. The new company was incorporated under the Companies Acts, 1862 to 1893, on March 11, 1898, under the name of "The Whitefriars Financial Company, Limited," with a nominal capital of 50,000*l.* in 1*l.* shares. On the same day, March 11, 1898, the six directors of the new company, who had also been directors of the old, in pursuance of the reconstruction scheme, allotted partly paid-up shares in the new company to the number of 9196, of which 5600 were held by themselves and the remainder by 107 other persons, all being members of the old company, and at the same time paid off in cash members who dissented from the scheme. The shares so allotted were issued in exchange for and upon delivery-up of fully paid-up shares in the old company in the proportion of two shares for one, except that the shares in the new company were issued at a premium of 5*s.* and credited with 15*s.* per share paid up.

The omission to file a proper contract was stated in an affidavit to have been purely accidental and due to inadvertence; and accordingly, to render the transaction on reconstruction

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valid, an application was made by originating summons under the Companies Acts, 1862 to 1898, by the six directors and shareholders of the new company against that company, for an order that, pursuant to the provisions contained in the Companies Act, 1898, the respondent company should file with the Registrar of Joint Stock Companies an office copy of the order to be made on the summons, together with a memorandum in writing in the form in the schedule to the summons, or in such other form as might be approved by the Court; and that upon such office copy and memorandum being filed within twenty-eight days from the passing and entering of the said order, and upon the memorandum being, before the filing thereof, stamped with the same amount of ad valorem stamp duty as would be chargeable upon a contract filed with the said registrar in compliance with s. 25 of the Companies Act, 1867, such memorandum should, in relation to such of the shares in the respondent company as were mentioned or referred to therein, operate as if it were a sufficient contract within the meaning of that section and had been duly filed with the said registrar before the issue of such shares, or that such further or other order might be made as the circumstances of the case might require.

Then followed a schedule containing the form of memorandum proposed to be filed.

The summons was adjourned into Court, and now came on for hearing.

Renshaw, Q.C., and *Pochin*, for all parties. The first question is whether an application for the relief provided by s. 1 of the Companies Act, 1898 (1), should be by motion or by

(1) Sect. 1 of the Companies Act, 1898 (61 & 62 Vict. c. 26), is as follows:—

"(1.) Whenever, before or after the commencement of this Act, any shares in the capital of any company under the Companies Acts, 1862 and 1890, credited as fully or partly paid up shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract or no sufficient contract is filed with the Registrar of Joint Stock Companies, in compliance with section twenty-five of the Companies Act, 1867, the company or any person interested in such shares or any of them may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or

summons. By sub-s. 2, the practice with regard to applications to rectify the register of shareholders of a company is to be followed, and that practice seems to be by motion: *Duffin* v. *Mexican Gold and Silver Ore Reduction Co.* (1) But a summons in chambers appears to be the more convenient course.

[KEKEWICH J. I think the application, if by summons, should be heard in Court.]

It is not wrong to make it in chambers in the first instance by summons.

[KEKEWICH J. I do not think it is.]

The next point is whether the application is sufficiently made by 6 out of the 113 shareholders. It is not, we submit, necessary that all should concur. Sub-s. 1 of s. 1 expressly says

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sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall, in relation to such shares, operate as if it had been duly filed with the registrar aforesaid before the issue of such shares.

"(2.) Any such application may be made in the manner in which an application to rectify the register of members may be made under section thirty-five of the Companies Act, 1862, and either before or after an order has been made or an effective resolution has been passed for the winding up of such company, and either before or after the commencement of any proceedings for enforcing the liability on such shares consequent on the omission aforesaid, and any such application shall, if not made by the company, be served on the company.

"(3.) Any such order may be made on such terms and conditions as the Court may think fit, and the Court may make such order as to costs as it deems proper, and may direct that an office copy of the order shall be filed with the registrar aforesaid, and the order shall in all respects have full effect.

"(4.) Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may, in lieu thereof, direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period it shall in relation to such shares operate as if it were a sufficient contract in writing within the meaning of section twenty-five of the Companies Act, 1867, and had been duly filed with the registrar aforesaid before the issue of such shares. The memorandum shall before the filing thereof be stamped with the same amount of ad valorem stamp duty as would be chargeable upon the requisite contract unless the contract has been produced to the registrar duly stamped, or unless the registrar is otherwise satisfied that the contract was duly stamped."

(1) W. N. (1890) 116.

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that any person interested in "any" of the shares may apply. Then the last point is whether this is a case falling within sub-s. 4. We submit that it is, the filing of a contract between the shareholders carrying out the reconstruction scheme having become both "inconvenient" and "impracticable." We therefore ask that we may be at liberty to file a memorandum specifying the transaction. When that has been done, the memorandum will operate as a "sufficient contract."

KEKEWICH J. This application was brought before me in chambers under the Companies Act, 1898, when I came to the conclusion that the summons was right in form. It was adjourned by myself into Court. The question has arisen whether an application for relief under the Act should be by summons or by motion. Sub-s. 2 of s. 1 says that the application "may be made in the manner in which an application to rectify the register of members may be made," and it has always been the practice, so far as I can remember or ascertain, to make an application to rectify by motion. Mr. Renshaw has cited *Duffin* v. *Mexican Gold and Silver Ore Reduction Co.* (1) as shewing that an application to rectify should be by motion and not by summons, but that is scarcely an authority. In my opinion such applications, though they may be made by motion, are better made by summons to ensure publicity, as well as for other reasons, and the summons should be heard and disposed of in open Court, for it affects the register of shareholders to which the public has access. I am sorry if any company should suffer inconvenience by having to make applications to rectify in open Court, but, in my opinion, this is just one of those applications which ought to be made in Court and be put in the list for hearing in Court where there are ears to hear. For the same reason it appears to me that an application for relief under this new Act of 1898 should also be heard in open Court, and though it may be made by motion, yet the better course is to make it by summons taken out in chambers in the first instance and adjourned into Court.

Then the next point is whether an application under the Act

(1) W. N. (1890) 116.

should be made by all the shareholders or may be made by any of them. This is a new Act of Parliament and a new procedure which one must consider carefully. It occurred to me that there might be some danger in the application being made by some only of the shareholders, for some persons might apply for relief as to the shares of other persons. But I could not hold that all the shareholders must apply without adopting a strained construction of the Act. I must follow the words of sub-s. 1 of s. 1, according to which "any person interested in such shares or any of them" may apply, and therefore I hold that the application is properly made by these six shareholders.

I think this is clearly a case contemplated by the Act, and therefore the order may go as asked by the summons. A memorandum in the form set out in the schedule to the summons must be filed with the Registrar of Joint Stock Companies pursuant to sub-s. 4 of s. 1; but the memorandum must have added to it a statement that it is approved by the Court, and is filed under the order made to-day. I think, also, that the form of memorandum should be set out totidem verbis in a schedule as part of the order.

The order was ultimately drawn up in the following form:—

"The application (by originating summons dated the 21st of October, 1898) of, &c. (respectively directors of the above-named company) which, upon hearing in chambers the counsel for the applicants and for the respondents the said company, was adjourned to be heard in Court, coming on this day to be heard accordingly, and upon hearing counsel, &c., and upon reading, &c.: And this Court being satisfied that it is just and equitable to grant relief in respect of the issue of the shares in the memorandum in the schedule of this order referred to without filing any contract, and that it is impracticable to file a contract pursuant to s. 25 of the Companies Act, 1867, and having approved of the memorandum (a copy of which is set forth in the schedule hereto) as a proper memorandum to be filed in lieu of such contract, Doth pursuant to the Companies Act, 1898, order that the Whitefriars Financial Company, Limited, do within 28 days after the passing and entering of this order, file such memorandum with the Registrar of Joint Stock Companies. And it is ordered that such memorandum, upon being so filed, shall, in relation to such of the shares in the said company as are mentioned or referred to therein, operate as if it were a sufficient contract in writing within the meaning of s. 25 of the Companies Act, 1867, and had been duly filed with the said registrar before the issue of the said shares.

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"The Schedule above referred to.

"Memorandum approved by the Court and directed to be filed by order dated 25th November, 1898, made 'In the matter of the Whitefriars Financial Company, Limited,' specifying the consideration for which such of the shares in the said company as are mentioned or referred to therein were issued.

"At an extraordinary general meeting of the members of a company registered under the Companies Acts on the 6th of April, 1893, as 'The Whitefriars Financial Company, Limited' (hereinafter referred to as 'the old company'), special resolutions were duly passed and at a subsequent extraordinary general meeting of the old company were duly confirmed, whereby it was resolved (inter alia) that, or to the effect that, the old company should be wound up, and that for the purpose of taking over the assets (as from January 1st, 1898) including the reserve fund and liabilities of the old company another company should be formed and registered with limited liability under the Companies Acts, 1862 to 1893, and named 'The Whitefriars Financial Company, Limited,' having a capital of 50,000*l.* divided into 50,000 shares of 1*l.* each, and that every shareholder in the old company should be entitled, upon giving notice as in the said resolutions mentioned and satisfying his liabilities to the old company, to receive in exchange for each share held by him in the old company two shares in the new company, such shares to be issued at a premium of 5*s.* per share and on the footing of being paid up to the extent of 15*s.* per share with a liability to calls to the extent of 5*s.* on each share. In accordance with the said resolutions the new company was registered under the Companies Acts, 1862 to 1893, on the 11th of March, 1898, and shortly after its incorporation 9196 shares of 1*l.* each in the new company (being the shares numbered as hereinafter mentioned) were issued to shareholders in the old company at a premium of 5*s.* per share and on the footing of being paid up to the extent of 15*s.* per share in exchange for 4598 shares in the old company held by such shareholders. No contract was, at or before the issue of such shares or any of them, filed with the Registrar of Joint Stock Companies in compliance with s. 25 of the Companies Act, 1867.

"The said shares being numbered as follows, that is to say:—

Denoting numbers of shares
&c. &c. &c.

."

Solicitor: *A. I. Pidduck.*

G. I. F. C.

In re REEVES & SON, LIMITED.

Motion under the Companies Act, 1898, by present holders

of vendors' shares in the company—which had been formed for taking over a partnership business—for leave to file, pursuant to s. 1, sub-s. 4, a memorandum in lieu of a contract.

Neither the agreement under which the shares had been issued, nor the agreement by the company adopting it, had been filed, but only a short agreement reciting them, and the ground of the application was that, under the circumstances, it was inconvenient to file the agreements.

E. J. Elgood, for all parties.

KEKEWICH J. made the order, and himself settled the minutes in the following form:—

"Upon motion, &c., and upon hearing counsel, &c., and upon reading the affidavit, &c, the Court being satisfied that it is just and equitable to grant relief, and that the filing of the requisite contract referred to in s. 1, sub-s. 4, of the Companies Act, 1898, would cause inconvenience: Direct that in lieu thereof there be, on or before the 31st day of December, 1898, filed with the Registrar of Joint Stock Companies a memorandum in writing in the form set forth in the schedule hereto, which is hereby approved by the Court. Direct that, upon the filing of the memorandum within the time aforesaid with the said registrar, it shall, in relation to the shares in the above-named company in the said memorandum referred to, operate as if it were a sufficient contract in writing within the meaning of s. 25 of the Companies Act, 1867, and had been duly filed with the said registrar before the issue of such shares. The costs of the applicants [naming them] of and incident to the said motion to be taxed as between solicitor and client and paid to them by the above-named company.

"The Schedule above referred to.

"REEVES & SON, LIMITED.

"Pursuant to an order of the High Court of Justice made by Mr. Justice Kekewich on the 3rd December, 1898, in, &c. Be it remembered that the [shares in question, describing them] were issued to the several persons hereunder named in satisfaction of the sum of £—— part of the consideration of £—— agreed to be paid by the company to [their vendors] for the purchase of [the company's property, describing it] and of the goodwill of the business of [describing it], formerly carried on in partnership by the said [vendors] thereon," and all the moneys, &c., book debts, things in action and trade-marks of and belonging to the said partnership on the 1st of January, 1890, and the benefit of all contracts and the plant and stock-in-trade and all other (if any) the real and personal property connected with the business and all the interest of the vendors therein. Then followed a list of the original holders of the

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shares in question, with the number and the distinctive numbers of the shares allotted to them respectively.

[A proposed clause providing for the filing of an office copy of the present order with the registrar was struck out by his Lordship with the following note: "This is not contemplated by sub-s. 4, and might be inconvenient."]

Solicitors: *Gush, Phillips, Walters & Williams.*

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In re F. W. JARVIS & CO., LIMITED.

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Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-ss.* 1 *and* 4—*Signatory to Memorandum of Association for* 6500 *Shares—Sale of Business by Signatory for* 6500*l. payable by* 6500 *fully paid-up Shares—Same Shares.*

A company was formed to take over the business carried on by J. J. signed the memorandum of association for 6500 shares of 1*l.* each. The company was registered on October 4, 1897; on October 8 a contract in writing between J. and the company was executed, whereby J. agreed to sell his business to the company in consideration of 6500*l.* payable by the allotment to him of 6500 fully paid-up shares of 1*l.* each in the company. The 6500 shares were duly allotted to J. under the contract. No other shares other than those were ever applied for by or allotted to J., and there was evidence to shew that the 6500 shares for which J. signed the memorandum of association were considered by all parties to be the same 6500 shares issuable to him under the contract, and that J. did not intend by so signing the memorandum of association to render himself liable to take any shares other than the 6500 mentioned in the contract:—

Held, on motion made under s. 1, sub-ss. 1 and 4, of the Companies Act, 1898, for an order for filing a fresh contract in writing, or in the alternative for filing a memorandum specifying the consideration for which the shares were issued, that the case was not within the Act, that the contract filed under s. 25 of the Act of 1867 was a proper and sufficient contract, and that the object of the application was not to get rid of any liability under that contract, but to obtain indirectly the decision of the Court whether or not J. was under some liability in respect of the shares for which he signed the memorandum of association, and that it was not contemplated by the Act of 1898 that it should be used for the decision of such a question, and the motion was refused.

THE above-named company was incorporated on October 4, 1897, with a capital of 30,000*l.*, divided into 30,000 shares of 1*l.* each, and was formed to acquire and take over the business of a maltster and corn merchant theretofore carried on by F. W. Jarvis at Newmarket, in the county of Suffolk.

F. W. Jarvis was a signatory to the memorandum of association of the company for 6500 shares, and he was one of the first directors of the company.

By an agreement dated October 8, 1897, and made between F. W. Jarvis of the one part, and the company of the other part, F. W. Jarvis agreed to sell his said business and the

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freehold buildings on which the same was carried on, and his trade-marks, plant, and machinery, to the company for 6500*l.*, payable by the allotment to him of 6500 fully paid-up shares in the company; and at a board meeting held the same day the seal of the company was affixed to the said agreement.

The agreement was filed with the Registrar of Joint Stock Companies on November 4, 1897, and on November 11, 1897, the 6500 shares mentioned therein were allotted to F. W. Jarvis, and a certificate therefor was issued to him, and his name was entered on the share register in respect of those shares.

By a conveyance dated January 25, 1898, F. W. Jarvis conveyed to the company the property comprised in the agreement dated October 8, 1897.

No shares were ever applied for by or issued or allotted to F. W. Jarvis other than the 6500 shares issuable to him under the agreement of October 8, 1897.

This was a motion on behalf of the company that, with respect to the 6500 shares standing in the name of F. W. Jarvis, an order might be made for the filing with the Registrar of Joint Stock Companies of a contract in writing sufficient in the opinion of the Court within the meaning of s. 1 of the Companies Act, 1898, and that on such contract being filed it should in relation to such shares operate as if it had been duly filed before the issue of such shares, or in the alternative, and if the Court should be satisfied that the filing of the requisite contract would cause delay or inconvenience or be impracticable, an order might be made for the filing of a memorandum in writing specifying the consideration for which the said shares were issued, and that in that case it might be ordered that on such memorandum being filed it should in relation to such shares operate as if it were a sufficient contract in writing within the meaning of s. 25 of the Companies Act, 1867, and had been duly filed before the issue of such shares.

There was evidence that the 6500 shares for which F. W. Jarvis so signed the memorandum of association were the same 6500 shares issuable to him under the agreement of October 8, 1897, and that he did not intend by so signing the memorandum

of association to render himself liable to take any shares other than the 6500 shares mentioned in the agreement.

Howard Wright, for the motion. It must be taken, after the decision of the Court of Appeal in *Dalton Time Lock Co.* v. *Dalton* (1), that the 6500 shares for which Jarvis subscribed the memorandum of association were issued on the date of the registration of the company. That being so, there was no registered contract before their issue; therefore one condition of s. 1, sub-s. 1, of the Companies Act, 1898, is fulfilled.

The other condition of that section is that the shares are to be "credited as fully or partly paid up." Now "credited" imports intention; and it is clear here, from the registered contract and minutes, that all parties intended that they should be treated as fully paid up.

There is, moreover, nothing illegal in paying for shares for which the memorandum of association has been subscribed otherwise than in cash: *Pell's Case* (2); *Jones' Case.* (3) Those cases, it is true, were decided on transactions which took place before s. 25 of the Companies Act, 1867, came into force; but the same transactions would, I submit, have been good if that section had been in force, provided a contract had been registered: *Fothergill's Case* (4); and a contract might have been registered, if not "before," at any rate "at" the issue of the shares. Even if the contract to pay implied by signing the memorandum of association is a contract to pay in cash, there is nothing to prevent the parties varying it, and this the minutes shew they did.

All the conditions of s. 1, sub-s. 1, of the Companies Act, 1898, having thus been complied with, I submit the case is one where the Court would consider it "just and equitable" to grant the relief asked, and that it is such a case as the Act was intended to meet.

Cassel, for F. W. Jarvis, supported the motion.

ROMER J. I agree this is a case of great hardship, as far as I can see, upon the gentleman who has subscribed to the

(1) (1892) 66 L. T. 704.
(2) (1869) L. R. 5 Ch. 11.
(3) (1870) L. R. 6 Ch. 48.
(4) (1873) L. R. 8 Ch. 270.

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memorandum of association for this large number of shares, and I only wish I could see my way to help him; but, personally, it appears to me that the Acts of Parliament bearing on the question before me are too strong to enable me to do what is asked.

In the first place, there was undoubtedly a contract between Jarvis and the company under which Jarvis, as vendor to the company, was to receive 6500 fully paid-up shares, the consideration being the property he contracted to sell to the company. That contract was duly filed before the issue of the shares. It is a contract which satisfied the provisions of the 25th section of the Act of 1867, and on the face of it there was a proper contract and a sufficient contract filed with the Registrar of Joint Stock Companies before the issue of these shares, and undoubtedly these shares were intended to be the shares referred to in that contract. So far, then, there appears to be no difficulty. There is no liability on those shares; and the object of the present application is not to get rid of liability on those shares. The object of this application is to obtain indirectly a decision of the Court on another and entirely different question—namely, whether or not Jarvis is or is not under some liability in respect of shares by reason of his having signed the memorandum of association for the same number (6500) of shares.

In my opinion, it was never contemplated by the Act of 1898 that it should be used for the purpose of indirectly trying to obtain from the Court a decision on such a question as that I have indicated. As to the shares in respect of which this application arises, there is no liability. There is a sufficient contract filed, and the procedure of the Act is not necessary to protect the allottee of those shares, and I do not think I am bound to say that such a question as I am now asked to decide properly arises on an application of this kind under the Companies Act of 1898.

But I should be sorry to leave the case there, and I will add a few observations with a view of pointing out the difficulty there is in my saying anything which would relieve any liability Jarvis may be under by having signed the memorandum of association. Supposing I can hold that I could consider this

application on the ground that the contract that was filed was not a sufficient contract within s. 25 of the Act of 1867, so that I should be able to consider what I may call the merits of the case, then comes the question, can these shares that were issued in pursuance of that written contract that was filed be taken to be the shares for which Jarvis subscribed the memorandum of association? Directly the memorandum and articles of association were filed, there was at once a binding contract between Jarvis and the company that he should take these 6500 shares directly from the company, and the shares are in one sense of the term to be deemed issued immediately. How did matters stand at that time? There was no other contract in existence between Jarvis and the company. In the nature of things there could not have been, and there was not. It was contemplated that a contract would be made between him and the company by which he was to sell property to the company and take fully paid-up shares for the property; but that was a proposed contract which never could become a contract unless it was ratified and approved of by the company and finally entered into. Of course, it might never be entered into. That contract might never be made. There might be no such contract. But the contract created by the signature of the memorandum and the filing of the memorandum arose at once, and had nothing to do, so far as its validity was concerned, with regard to any other contract that might subsequently be entered into between Jarvis and the company. There was then of necessity, immediately the memorandum was filed, a contract by Jarvis to take shares from the company. What was the contract as to payment of those shares? That is settled by s. 25 of the Act of 1867. It is to be deemed a contract to pay for the shares in cash; because, as I have pointed out in this case, there could be no compliance with what I may call the saving clause in s. 25 for two reasons. There could be, in the first place, no other contract, no prior contract, no co-existing contract, and still less could there have been any such contract filed. It follows, then, that before anything further was done there was a binding contract between Jarvis and the company to take these 6500 shares and pay for them in cash.

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Now let me see what effect upon that contract the subsequent contract entered into between Jarvis and the company could have had. They could not have contracted so as to take the case, so to speak, out of s. 25. They could not have contracted so as to free Jarvis from his liability to pay for the memorandum shares in cash, and, therefore, any attempted contract entered into between him and the directors of the company subsequently to the filing of the memorandum could have had no effect upon the binding contract by which he had contracted to pay for these 6500 shares mentioned in the memorandum in cash. Now, as I have pointed out already, can you, by looking at the memorandum and articles of association, say that the shares for which he subscribed the memorandum are identified with the shares which had been subsequently the subject of a contract between him and the company? It could not be so. He could not have signed the memorandum of association for shares, conditional upon a contract being entered into between him and the company, for the company to take his property under certain conditions. At least, I know of no such case where that has been done; and certainly it was not done in this case, and there is nothing which would enable me to say that the shares for which he subscribed the memorandum must be, or could be taken to be, the shares which were to be the subject of the agreement, which it was hoped would be come to between him and the company.

The result is that I cannot hold that the memorandum of association was one of the contracts under which these shares were issued. If the directors purported to issue the shares under the memorandum, it appears to me they had no power to do it. If a shareholder has once contracted to take shares and pay for them in cash, he can only pay for them in cash, or cash equivalent in the strict sense of the term—that is to say, by cash or by set-off—something which would amount to payment on the one hand in cash, and repayment on the other. You cannot satisfy the liability of a shareholder to pay for shares he has taken in cash by an arrangement to pay for them in land or property. For these reasons, it appears to me

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that if on this application I go into, as I have done, the merits of the case, I do not see my way to comply with the request, and I must therefore refuse the application.

Of course, nothing I have said here, I trust, can be taken to prejudice any question that may hereafter arise, as between Mr. Jarvis and the company, as to whether under the circumstances he is or is not bound to take other shares under the memorandum of association. That is a question which is not finally before me, and which I cannot pretend to dispose of on this application. There may be some grounds not apparent to me now on which he may escape any such liability. All I do is to refuse the motion. I ought to say, however, that in my opinion this case is really governed by the principle laid down in *Fothergill's Case.* (1)

Solicitors: *Freshfields & Williams.*

G. M.

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STATHAM *v.* BRIGHTON MARINE PALACE AND PIER COMPANY.

[1898 S. 2972.]

Company—Issue of Shares at a Discount—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 60—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 21—*Companies Clauses Act*, 1869 (32 & 33 *Vict. c.* 48), *s.* 5.

A company governed by the Companies Clauses Consolidation Act, 1845, and the Acts amending it, may issue fully paid-up original shares at a sum less than their nominal amount in the same manner as new shares can under the authority of those Acts be issued.

THE defendant company was incorporated by the Brighton Marine Palace and Pier Act, 1888, with which were incorporated the Companies Clauses Consolidation Act, 1845, and the amending Acts, with a capital of 150,000*l.*, divided into 15,000 shares of 10*l.* each, for the purpose of taking down and removing the Chain Pier at Brighton and making and

(1) L. R. 8 Ch. 270.

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maintaining a new pier and works as therein described. The Act contained powers of borrowing and issuing debentures as therein mentioned.

In June, 1890, a company called "The Brighton Marine Palace and Pier, Limited," hereinafter called the "Limited Company," was formed under the Companies Acts, 1862 to 1886, having a capital of 75,000*l.*, divided into 15,000 shares of 5*l.* each. Amongst the objects of the Limited Company were the following, namely, (*a*) to adopt and carry into effect an agreement already prepared and afterwards dated July 15, 1891, between the defendant company of the first part, the Limited Company of the second part, and the English and Foreign Public Works Company, hereinafter called the "Works Company," of the third part; (*b*) to acquire all or any of the shares of the defendant company and all or any part of the assets of that company, and to carry on and develop the business of that company; (*c*) to construct and maintain at Brighton a pier and other works; (*d*) to borrow money and issue debentures.

By certain agreements, all dated prior to July, 1891, made between the Chain Pier Company of the one part and the defendant company of the other part, the Chain Pier Company agreed to sell to the defendant company the pier and property comprised in the undertaking of the Chain Pier Company for 15,000*l.*

In July, 1891, it had been agreed that the Works Company should take over and perform on behalf of the defendant company the last-mentioned agreements in the same manner as if the Works Company had been party to these agreements instead of the defendant company, and that the defendant company should from time to time issue to the Works Company the whole of the authorized share capital of the defendant company, namely, 15,000 shares of 10*l.* each, such shares to be deemed for all purposes as fully paid up, and by an agreement dated July 16, 1891, between the defendant company of the first part, the Limited Company of the second part, and the Works Company of the third part, it was agreed that the Works Company should assign to the Limited Company all benefit and interest of the Works Company under the herein-

before mentioned agreement between the defendant company and the Works Company.

By another agreement, dated July 16, 1891, between the Limited Company of the one part and Alfred Woodhouse of the other part, Woodhouse agreed to erect the new pier and buildings fit for use within the time therein mentioned, and in November, 1891, he commenced the works, and continued the same till October, 1892.

On December 15, 1891, the defendant company passed a resolution to the effect that 2500 shares should be allotted as fully paid to the Limited Company for the sum of 5000*l.*, and on the same day the sum of 5000*l.* was paid by the Limited Company to the defendant company, and in due course a certificate for 2500 shares in the defendant company was handed to the secretary of the Limited Company.

On May 3, 1892, the defendant company passed a resolution to the same effect as to 2800 shares in consideration of 5600*l.*, and in due course a certificate for 2800 shares was handed to the secretary of the Limited Company.

Woodhouse having made default in the proper performance of his contract, the same was determined by the Limited Company; and in November, 1892, they took possession of the works and continued them till, in consequence of having exhausted all their available funds, they ceased work.

By an order dated May 10, 1895, made in a debenture-holder's action commenced against the Limited Company, a receiver was appointed of the undertaking and property of the Limited Company, including the shares so issued as above by the defendant company to the Limited Company, and it was ordered that the property should be sold. In pursuance of such order the receiver agreed to sell to one Howard, amongst other assets of the Limited Company, 5299 shares in the defendant company standing in the name of the Limited Company, and the sanction of the Court having been obtained to such agreement the receiver, at the request of Howard, executed to the plaintiff a proper transfer of the 5299 shares in the defendant company, and the transfer was duly registered in the books of that company. The remaining one share of the

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5300 shares had previously been transferred by the Limited Company to one Ronald.

The nominal value of the shares so transferred to the plaintiff was 52,990*l.*; but the defendant company, contending that the amount paid on such shares was 37,228*l.* only, being equivalent to about 7*l.* 0*s.* 6*d.* on each share of 10*l.*, this action was commenced, the plaintiff by his statement of claim alleging that the 5300 shares in the defendant company were duly issued and allotted to the Limited Company in consideration for the acquisition of the undertaking of the Chain Pier Company, for work and labour done, and materials supplied in and about the construction of the New Pier, and in consideration of the payment of the two sums of 5000*l.* and 5600*l.* to be paid by the Limited Company to the defendant company, and that under the circumstances all the shares were issued to the Limited Company as fully paid-up shares, and were for all purposes fully paid-up shares in the defendant company, and that at the time the shares were issued to the Limited Company that company was entitled under the contracts to have the shares issued to them as fully paid-up shares; and the plaintiff claimed a declaration that the 5299 shares standing in his name in the books of the defendant company were issued by that company as, and that the same were, fully paid-up shares, and that the defendant company might be ordered to rectify their register of shareholders accordingly.

Farwell, Q.C., and *Method*, for the plaintiff. The question is whether it is ultra vires of a company formed under a special Act of Parliament, with which is incorporated the Companies Clauses Acts, to issue fully paid-up original shares at a discount. Your Lordship decided in *Webb* v. *Shropshire Rys. Co.* (1), and your decision was affirmed by the Court of Appeal, that a railway company governed by the Companies Clauses Acts might issue fully paid-up original stock at a discount, but the point as to original shares was left open.

With respect to the power to issue shares at a discount, there is no authority against it, nor any clause in the Companies

(1) [1893] 3 Ch. 307.

Clauses Acts which negatives it. There is no mention of the subject in the Companies Clauses Act, 1845. By s. 21 of the Companies Clauses Act, 1863, it was enacted that a company formed under the Companies Clauses Acts might issue new shares and new stock upon such terms and conditions as the directors might determine, but so that not less than the nominal amount of each share or stock should be payable in respect thereof. By s. 27 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), the prohibition against issuing such shares or stock for less than the nominal amount was removed as to railway companies; and then, by s. 5 of the Companies Clauses Act, 1869, the prohibition was removed as to all companies formed under the Companies Clauses Acts. The reasons which influenced the Court in *Ooregum Gold Mining Co. of India* v. *Roper* (1) in holding that shares in ordinary joint stock companies cannot be issued at a discount do not apply to companies governed by the Companies Clauses Acts. Looking at the Acts of 1863, 1867, and 1869, with respect to the issue of new shares, we submit that the implication is that the original shares can also be issued at a discount, and we ask for a declaration in the terms of the claim.

Ingpen, for the defendant company. There is no mention in any of the Companies Clauses Acts of the issue of shares at less than their nominal amount, and I submit that the implication is strong that it was never intended to be permitted. There is no authority which has declared it lawful; and I submit that the reasons for holding that companies formed under the Companies Acts are not authorized to issue shares at a discount apply equally to companies governed by the Companies Clauses Acts, and I submit that the enactments in the Companies Clauses Acts with regard to the issue of new shares imply that original shares could not be issued at a discount.

ROMER J. The question before me is a short one: it is whether the shares of the defendant company which were issued at a discount were lawfully issued.

The point involved is a large one: whether or not a company,

(1) [1892] A. C. 125.

ROMER J.
1898
STATHAM
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BRIGHTON MARINE PALACE AND PIER COMPANY.

with which is incorporated the Companies Clauses Consolidation Act, 1845, and the amending Acts, issuing its shares, which are governed by these Acts, has power to issue them except on the terms that the full nominal amount of the shares should be paid in full.

Now there is nothing in the Companies Clauses Consolidation Acts directly affecting this point with regard to what I may call the original shares of the company; but there are provisions with regard to new shares which shew conclusively that the Legislature contemplated and authorized new shares being issued at a discount. One cannot see any reason for a distinction being drawn between new shares of a company of this class and the original shares. When I look at the provisions of the Companies Clauses Consolidation Act, 1845, with regard to original shares, I find a distinction drawn between shares subscribed for and shares otherwise acquired by shareholders; and it does appear to me, with regard to shares subscribed for, as an inference from the wording of the Act of 1845, that these shares must be paid for in full—at least, that is my present opinion, although I have not expressly to decide the point. But the Act does contemplate shares being acquired otherwise than by subscription, and the shares now in question before me were so otherwise acquired. They were not subscribed for, and, with regard to shares which are not subscribed for within the meaning of those words as used in the Act of 1845, I can find no sufficient reason appearing in that Act, and certainly I can find no sufficient reason appearing in the special Act before me, why I should hold that these shares should not have been allotted in consideration of a less sum than the nominal amount. I can find no provision in the Act bearing on the point, nor do I see why, on principle, I should hold that shares not subscribed for should not be allotted in consideration of a sum less than the nominal amount just as new shares can, and I hold that they can be so allotted.

Solicitors: *Bolton & Co.; J. T. Rossiter.*

G. M.

In re WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY.

ROMER J.
1898
Dec. 15, 16.

Railway Company—Debenture Stock—Interest on overdrawn Banker's Account —Subrogation.

A railway company had by their Acts power to create and issue debenture stock of three classes, called respectively A, B, and C; and it was provided that the A debenture stock and interest should have priority over the B debenture stock and interest, and that the C stock should rank after the B stock. The interest on the several debenture stocks due August 1, 1897, was paid by the company's bankers, and by that means the company's account at the bank became largely overdrawn. On August 5, 1897, judgment was obtained against the railway company, and a receiver was appointed. The bank had no knowledge when allowing the overdraft that proceedings were pending against the company. It appeared from the books of the bank that so much of the overdraft was attributable to the payment of interest on the A stock, so much to that on the B stock, and so much to that on the C stock. There being money in the receiver's hands sufficient to pay the interest on the A stock, leaving a surplus available to pay the interest on the B stock, the bank claimed to be entitled, to the extent of the prior interest on the A stock paid off by them, to be subrogated to the rights of the A debenture stockholders, and to be paid in priority to the B debenture stockholders.

Held, that the bank was not entitled to be paid any part of the money in the receiver's hands in priority to the B debenture stockholders.

Blackburn and District Benefit Building Society v. *Cunliffe, Brooks & Co.*, (1885) 29 Ch. D. 902, discussed and distinguished.

THIS case, which has been previously reported (1), was an application on the part of the North and South Wales Bank for an order that they were entitled to be subrogated to the rights of the debenture stockholders of the above railway company to the extent of the sum of 7600*l.* and interest, being the balance due to the bank on account of moneys paid by them at the request of the railway company in discharge of interest which became due in August, 1897, from the railway company to the holders of debenture stock of the company, and for an order that the receiver appointed in the above matter should, out of any moneys in or coming to his hands as such receiver, first discharge the principal sum and interest

(1) [1898] 2 Ch. 663.

ROMER J.
1898
WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY, *In re.*

due to the bank in priority to any payments to be made by him to the debenture stockholders.

After argument Romer J. decided that the bank was not entitled, as against the debenture stockholders, to have any part of its claim paid out of moneys in the receiver's hands before payment thereout of interest due and payable to the debenture stockholders.

The case was now restored to the paper upon the following facts, which had not previously been before the Court.

Under their Act of 1883 the railway company were authorized to create and issue debenture stock of two classes, to be called A and B debenture stock respectively, to be permanently charged upon the undertaking of the company, neither class to exceed 175,000*l.*, bearing interest at a rate not exceeding 4 per cent. per annum; and it was provided that the A debenture stock and all interest thereon should have priority over the B debenture stock and interest, and that the B debenture stock and all interest thereon should rank next to the A debenture stock and interest.

By their Act of 1888 it was provided that the railway company might, in addition to the A and B debenture stock, create and issue debenture stock, to be called C debenture stock, not to exceed in amount 145,000*l.*, and that such stock and all interest thereon should rank next to the B debenture stock and interest.

It appeared that the sum of 9672*l.* mentioned in the former report of this case (1), and paid by the bank to the holders of debenture stock, was in fact paid as follows, that is to say, the sum of 3850*l.* was paid by the bank to the holders of the A debenture stock in respect of the interest payable on such stock; the sum of 3380*l.* was paid to the holders of the B debenture stock in respect of the interest payable on such stock; and the residue of the sum of 9672*l.* was paid by the bank to the holders of the C debenture stock in respect of the interest payable on such stock.

The amount due to the bank in respect of the advances being 7600*l.*, it was submitted that the difference between that sum and the sum of 9672*l.*, the sum advanced, should be attributed

(1) [1898] 2 Ch. 663.

to the several sums paid to the holders of the A, B, and C debenture stock, in proportion to the amounts paid to them respectively, and that the balance advanced and paid to the A debenture stockholders should be repaid to the bank before any sum was paid in respect of interest to the holders of the B or C debenture stock, and that the balance advanced and paid to the B debenture stockholders should be repaid to the bank before any payment was made in respect of interest to the holders of the C debenture stock.

Neville, Q.C., Method, and *Danckwerts*, for the bank. The receiver has in his hands moneys sufficient to pay the interest on the A debenture stock, leaving a surplus available to pay the interest on the B debenture stock. We submit, as under the Act incorporating the railway company the A debenture stock and interest has priority over the B debenture stock and interest, that, to the extent of the moneys advanced by the bank in order to pay the interest on the A debenture stock, the bank is now entitled to stand in the shoes of the A debenture stockholders as against the B debenture stockholders. We rely on *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1), where it was held that, as some of the money advanced by the bankers in that case had gone to pay withdrawing members who as against other members were entitled to priority, the bankers were entitled to stand in the place o such withdrawing members, and to receive the amounts which would have been paid to such members if they had not been paid off. We submit that the position of the A debenture stockholders who have priority over the B debenture stockholders is analogous to that of the "withdrawing members."

Frederic Thompson, for certain of the debenture stockholders, and *Theobald*, for other stockholders, were not called on.

R. J. Parker, for the Wrexham Company.

Mark Romer, for the Great Central Railway Company.

ROMER J. This case is restored to be heard on a fact and particular contention on the part of the bank not previously

(1) 29 Ch. D. 902.

ROMER J.
1898
WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY, *In re.*

before me. It appears that the income of the company is sufficient to pay the interest on the A debenture stock and leave a surplus available to pay the interest on the B debenture stock. The bank contends that on the principle of subrogation to the extent of the prior interest on the A stock paid off by the bank it is entitled to be ranked as debenture holders and to be paid in priority to the B debenture stock. Much of what I previously said applies to this contention, and need not be repeated. I may, however, again point out that the bank advanced its money under no contract purporting to give it a security for the money, and that the B stockholders knew nothing of the source from which the money came which paid the former interest, and were not bound to inquire. I cannot see any sufficient reason why the B stockholders should now find themselves placed in the position of having a charge second not only to that of the A stock, but to that of the bank. It is said they are not injured, because if the bank's money had not been applied in paying off the A interest it would still rank for payment. But suppose the case had been that the railway company had, at the time when the bank lent its money, other assets which could and should have been applied in paying off the A interest, and that the railway company's insolvency had arisen from a subsequent unexpected loss, are the B stockholders to be now affected, because, instead of applying their other assets at the time in paying the A interest, the railway company chose to pay it out of the money borrowed from the bank? And if not, is the Court to embark in an investigation as to what the exact pecuniary position of the company was at the time of the borrowing? I think not. And if the principle advocated by the bank is correct, where is it to stop? There might have been years of past interest paid off by money illegally borrowed from the bank. If the bank's contention be correct, all those years' interest might have been accumulating against the B stockholders without their knowledge or consent, and so that all further payment of interest to them would practically cease. They would certainly thereby be greatly prejudiced, yet during all the time of the accumulation they would have had no opportunity of protesting against it, or of applying for any remedy.

I cannot accede to the application. It appears to me to be wrong in principle and supported by no authority. The case of *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1) is no authority for this application. All that was there done was to allow bankers from whom money had been illegally borrowed by the building society, and which money had been applied in paying off members who had given notice of withdrawal, to stand in the place of those members as against the building society. That was no extension, to my mind, of the prior cases; for the withdrawing members, so far as concerns the building society, were in the position of creditors or quasi-creditors; so that in allowing the principle of subrogation to apply in that case the Court was not extending the old cases, or doing anything more than allowing the bankers who found the money there to rank as creditors of the society. Such a point as that involved in the case before me was not before the Court, and certainly was not argued. It appears at page 911 of the report of that case that the right of the bankers there was not objected to by their opponents; and when the Court said that they thought the claim was right it was, in my opinion, in the view that without argument the case was a simple one of the principle of subrogation in no wise affecting a question of secured creditors' rights. For these reasons I think the application fails, and the applicants must pay the costs incurred subsequent to my last order.

Solicitors: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool; Field, Roscoe & Co., for Evan Morris & Co., Wrexham; Sharpe, Parker & Co., for Alsop, Stevens, Harvey & Crooks, Liverpool; Norris, Allens & Chapman, for J. B. Pollitt, Manchester; Cunliffes & Davenport, for R. B. Lingard-Monk, Manchester.*

(1) 29 Ch. D. 902.

G. M.

WRIGHT J.

1898

Dec. 20, 21.

In re ROXBURGHE PRESS.

SPIERS & BEVAN'S CASE.

Company—Winding-up—Shareholder—Omission to File Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

Relief under the Companies Act, 1898, may be refused on the ground of matter of prejudice although it does not amount to bad faith, or gross negligence, or illegal conduct on the part of the applicant for relief.

R. sold his business to a company of which he was to be governing director. There was a written agreement for the sale of the business which provided that the consideration for the sale should be satisfied by the allotment to R.—nothing being said about his nominees—of certain fully paid shares in the company, and this agreement was filed with the Registrar of Joint Stock Companies before the shares were issued.

S. & B. agreed with R. to help him to dispose of the shares by circulating the company's prospectus amongst their customers, with personal letters recommending the shares, on the terms of receiving, as nominees of R., 200 of his fully paid shares, and a sum of 6*d.* on each share applied for on their recommendation. Shares not forming part of the shares mentioned in the agreement were afterwards allotted to S. & B. as fully paid. It was not shewn that S. & B. made any inquiry except from R. as to the truth of the prospectus (which in the opinion of the Court omitted to state the most material part of the real contract) or as to the value of the shares. In the winding-up of the company S. & B. were placed and retained on the list of contributories:—

Held, that S. & B.'s application for relief under the Act of 1898 must be refused.

A PUBLISHER called Rideal turned his business into a company called "The Roxburghe Press, Limited," of which, under the articles of association, he became "governing director." There was a written agreement for the sale of the business to the company, the consideration for which sale was to be satisfied by the allotment to Rideal of over 30,000 shares to be issued as fully paid up, and the numbers of which appeared in the contract.

The agreement did not state that the shares were to be preference shares; but the co-directors subsequently resolved that the allotment to Rideal should be made out of the 7 per cent. cumulative preference shares of the company.

It was subsequently agreed between Rideal and Messrs. Spiers & Bevan, who were accountants, that Spiers & Bevan should circulate a prospectus of the company amongst their customers with letters recommending the shares, on the terms of receiving, as nominees of the vendor, Rideal, 200 preference shares in the company to which he stated he was entitled, and also the sum of 6*d.* for every share applied for on their recommendation. The 200 shares were not transferred to Spiers & Bevan by Rideal, but were allotted to them as fully paid.

In the winding-up of the company the liquidator placed the names of Spiers & Bevan on the list of contributories in respect of the 200 shares. Spiers & Bevan applied for an order removing their names from the list, but Wright J. dismissed the application.

Spiers & Bevan then applied for relief under the Companies Act, 1898. Both applications were heard on December 20, 1898.

Buckmaster, in support of the application. The applicants were induced to believe that they were to have some of the fully paid shares to which the vendor was entitled, and in respect of which there was a contract on the file. They did not get the shares for nothing, but rendered service of value by issuing the prospectus and personal letters, and the shares were allotted to them as fully paid. If the contract between the vendor and the company had been in the ordinary form, it would have provided for the vendor's shares being allotted to him or his nominees, and the applicants only reasonably assumed that the shares taken by them were allotted to them as the vendor's nominees. If these had been ordinary shares they would have been covered by the contract, and the prospectus itself stated that the shares to be allotted to the vendor were preference shares. Under the circumstances it is "just and equitable" within the meaning of s. 1, sub-s. 1, of the Companies Act, 1898, that the applicants should be relieved from liability to pay for the shares in cash.

K. Nevill, for the liquidator. No reason has been shewn why the applicants should be relieved from liability. The

WRIGHT J. 1898 SPIERS & BEVAN'S CASE.

services rendered by the applicants were not in the ordinary course of business; they were part of a speculative transaction, and if the company's affairs had been successful the applicants would have made a grand thing out of it. In such a case the applicants ought not to be let off on the ground that they have not been vigilant enough to protect their own interests.

Cur. adv. vult.

Dec. 21. WRIGHT J. This case raises a question of great importance under the Act of this year for giving relief against the provisions of the 25th section of the Companies Act, 1867—namely, whether under this Act relief can properly be refused on the ground of what may be called matter of prejudice, as distinguished from bad faith, or gross negligence, or illegal conduct. The applicants would, in my judgment, have been entitled to relief if the shares which they took in the belief that they were fully paid shares, and which the company issued to them as fully paid, had been taken by them at their real or supposed value as payment for services of an ordinary business kind. Ought it to make any difference if the services rendered were the recommending or puffing of the vendor's shares with the view of helping him to unload them on the public, and in ignorance or without full inquiry whether they were valuable or worthless, and if, instead of taking them at an estimated value sufficient to pay the real worth of the services given, the claimants took them by way of a large commission of 100 shares for every 200 or 300 persons to whom they might recommend a purchase, besides a commission of 6*d.* per share the sale of which their introduction might effect? It is argued with much force against the applicants that on this view of the facts this was a speculative and questionable transaction, in which they must be left to protect themselves by their own vigilance, and that they ought not to be relieved at the expense of creditors or bonâ fide contributories. In some cases of this kind the amounts involved are very large. To allow the relief may be to deprive creditors of the principal or the only fund for their payment, or to subject to a greatly increased burden contributories who have already paid money

on their shares. To refuse the relief may mean ruin to applicants who have done nothing contrary to law. In some instances, especially where relief is sought by vendors, the questions which will have to be solved in this Court—and in other Courts if regard is to be had to considerations of the kind now in question—will be of the most difficult kind, governed by no definite principles of law, and varying with every complexity of circumstance. Yet to disregard them is hardly possible when it is left to the Court to exercise a discretion as to what is "just and equitable." It seems to me that such considerations cannot be wholly disregarded, and that it must in each case be a question of degree and fact. I cannot attempt to lay down any general rule beyond this—that I think it lies on the applicant to shew that he has acted with due caution and conscientiousness, and that he has done nothing to disentitle him to a relief at the cost of other innocent persons. In the present case I have come to the conclusion that the applicants ought not to be so assisted. They are accountants in a large way of business. One Rideal had converted his own publishing business into a company named the Roxburghe Press, Limited, of which he made himself "governing director," and he was to get as vendor about 30,000 7 per cent. cumulative preference shares issued as fully paid. These he was anxious to unload, and he asked the present applicants to help him by circulating the prospectus of his company among their customers with what are called "personal letters" recommending the shares. They agreed to issue copies with such letters to 600 persons on the terms that they should be given for themselves as nominees of the vendor 200 of his shares, and also the sum of 6*d.* for every share applied for on their recommendation. It does not appear that they made any inquiry, except from Rideal himself, as to the truth of the statements in the prospectus or the real value of the shares which they were recommending to the public. Under these circumstances, I am not disposed to relieve them from the consequences of their not having taken the trouble to look at the filed contract. If they had looked at it, they would have seen that it omitted all mention of the most material part

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of the real contract under which the vendor's shares were actually issued—namely, that they were to be 7 per cent. cumulative preference shares. I think the application must be dismissed with costs.

Solicitors for applicants: *Ward, Perks & McKay.*
Solicitors for liquidator: *Wetherfield & Baines.*

F. E.

In re CIVIL, NAVAL AND MILITARY OUTFITTERS, LIMITED.

C. A. 1898 WRIGHT J. *Nov.* 25. C. A. *Dec.* 14.

Company—Winding-up—Report of Official Receiver—Sufficiency—Finding of Fraud—Order for Public Examination—Jurisdiction—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Motion to Discharge Order for Public Examination—Time—Rules of the Supreme Court, Order* LVIII., *r.* 15.

To enable the Court to make an order, under sub-s. 3 of s. 8 of the Companies (Winding-up) Act, 1890, for the public examination of a person who is alleged to have taken part in the promotion or formation of a company in liquidation, the further report of the official receiver under sub-s. 2 must not only state that that person had taken part in the promotion or formation, and that, in the opinion of the official receiver, fraud had been committed by him in the promotion or formation, but must also state facts shewing a basis for the official receiver's opinion, and warranting the judge in calling upon the person implicated for an explanation.

Observations as to the proper mode of framing the report.

Order of Wright J. affirmed.

Per Wright J.: Notice of motion to discharge an ex parte order for public examination under sub-s. 3 ought to be given within a reasonably short time.

Whether the time for giving such a notice is fixed by Order LVIII., r. 15, of the Rules of the Supreme Court, *quære*.

APPEAL against the refusal of Wright J. to discharge an order which had been made ex parte in chambers, under sub-s. 3 of s. 8 (1) of the Companies (Winding-up) Act, 1890, for the

(1) Sect. 8, sub-s. 1: "Where the Court has made an order for winding up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

"(*a*) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

"(*b*) if the company has failed, as to the causes of the failure; and

"(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

"(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

"(3.) The Court may, after con-

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public examination of H. V. Long, as to the promotion or formation of the above company, which was in liquidation, it being alleged that Long was one of the promoters of the company.

By his further report, dated July 16, 1898, the official receiver reported to the Court (inter alia) as follows :—

" (1.) The Civil, Naval and Military Outfitters, Limited (hereinafter called ' the company '), was registered on July 19, 1897, with a nominal capital of 180,000*l.*, in 90,000 preference and 90,000 ordinary shares of 1*l.* each. According to the memorandum of association it was formed to acquire and take over as going concerns and carry on the business of Ascher & Co.; W. Cater & Co., Limited; R. W. Harman & Co.; Lacey Bros. & Marchant; Smith and MacQueen; and Westoby & Co.

" (2.) The promoters of the company were the Home, Foreign and Colonial Contract Company, Limited (hereinafter called ' the Contract Company '), a company which was registered on December 10, 1887, with a nominal capital of 1000*l.* in 200 shares of 5*l.* each, but which has never had a larger subscribed capital than 35*l.* The persons concerned in the promotion of

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sideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company."

"(7.) The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost prior to such examination, be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit. Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him. They shall also be open to the inspection of any creditor or contributory of the company at all reasonable times."

the company were Mr. Chas. Jas. Fox, Mr. John Power, Mr. H. L. Fox, Mr. C. T. Fox, Mr. H. V. Long, Mr. F. C. Westoby, Mr. Albert King, Mr. F. Cordeux Rhys, and Mr. Arthur Firmin.

" (3.) Early in the year 1897 the Contract Company, with the assistance of Mr. Chas. Jas. Fox and Mr. Power, was engaged in promoting a scheme for amalgamating a number of army tailors' and outfitters' businesses, with the object of transferring the same to a company to be formed for the purpose of acquiring and carrying them on.

" (4.) As a result of the negotiations entered into the Contract Company acquired from various traders or their representatives options to purchase the following businesses on the terms stated (inter alia): W. Cater & Co., Limited, for 35,000*l.*, to be paid 25,000*l.* in cash and 10,000*l.* in fully paid shares. The assets included in the purchase price were to be 'lease, goodwill, book debts (10,343*l.* 3*s.* 3*d.*), and stock-in-trade.'

" (5.) With regard to W. Cater & Co., Limited, it has transpired that the Contract Company were introduced by Mr. Cordeux Rhys (who afterwards became a director of the company) to Mr. Harry Vince Long, who at that date was entitled by agreement to acquire the assets of W. Cater & Co., Limited. As commission or remuneration for the introduction Mr. Rhys was to be entitled to one-half of the net profits made by Mr. Long on the sale to the company.

" (7.) By an agreement dated July 28, 1897, the Contract Company sold to the company the benefit of the options they had acquired for 160,000*l.*, payable 60,000*l.* in cash, 50,000*l.* in shares, and 50,000*l.* in cash or shares, at the option of the directors of the company, it being stipulated that the company might acquire any or all of the businesses named and pay for such business or businesses so acquired the purchase price provided for in the following table (inter alia)—W. Cater & Co., Limited, 55,000*l.* for lease and goodwill, including stock, fixtures, and book debts.

" (11.) The prospectus was issued early in August, 1897, the list of subscriptions closing on the 11th of that month.

" (12.) The following statement appears in the prospectus:

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'A home industry, including government contractors, civil, naval and military tailors and outfitters, having a record of nearly 150 years' trading, and others, shewing certified profits which, after providing 6 per cent. dividend upon the preference shares, leave upwards of 10,000*l.* for the ordinary shares and the management.' The only business to be acquired by the company which had a record of 150 years' trading was W. Cater & Co.; most of the remaining businesses were of comparatively recent standing.

"(14.) The following statements also appear in the prospectus: 'This company is formed to acquire, consolidate and carry on under one management a number of select old-established high-class businesses, situate in the very best positions in the City and West End of London, making substantial annual profits. The following firms amongst others are included in the combination.' [The names were given, including Cater & Co.] 'The businesses include army and navy clothiers and contractors; helmet, cap and accoutrement makers; and civil, naval and military tailors and outfitters. The directors consider that this organisation is a unique opportunity for the investing public, and is bound to take high rank amongst home industrial investments. No joint stock investment ever offered to the public has promised so influential or wealthy a connection as that to be taken over by this company, including as it does businesses which have been established for nearly 150 years, and which are under the patronage of' [a number of royal persons whose names were given, including the Queen and the Tsar of Russia].

"These statements were based upon the assumption that the company intended to acquire the whole of the businesses enumerated in the prospectus. No reference was made to the option granted to the company by the agreement of July 28, 1897, to purchase such of the businesses only as the directors might select. One of the principal inducements to subscribe capital held out in the prospectus was, that the several businesses would be amalgamated under the company, with the result that the expenses of management would be materially reduced.

"(15.) The following statement also appears in the prospectus:—

"'One of the departments of special value is the business of Messrs. Cater & Co., helmet, cap, and accoutrement makers, established in the year 1776 at 56, Pall Mall, and since carried on uninterruptedly at that address. Situated near all the principal clubhouses, its position for this class of business is one of the best in the West End of London. The premises are quite new, having been rebuilt during the last ten years, and there is an extensive factory in the rear, fitted with every modern requirement for their special trade. There is another factory in connection with this business situated in Blackfriars Road, fully equipped with modern plant and machinery sufficient for the requirements of the much larger trade which is anticipated.'

"The recent history of this business is as follows:—

"In the spring of the year 1893 the business was carried on by Mr. William de Wilde Cater, at 56, Pall Mall, who at the time was pressed for working capital. With the object of raising funds by means of debentures a limited company, called Cater & Co, Limited, was formed by him, which was incorporated on April 28, 1893, with a nominal capital of 40,000*l.*, in shares of 10*l.* each.

"The business was sold by Mr. Cater to the company for 41,000*l.*, payable 5000*l.* in debentures and 36,000*l.* in shares. The debentures only were, however, issued to the vendor. The purchase consideration was based upon a balance-sheet, as at December 1, 1892, which shewed a surplus of assets over liabilities of 41,989*l.* In arriving at this figure the value of the lease of the premises 55 and 56, Pall Mall, was taken at 12,000*l.*, and the goodwill of the business at 20,000*l.* Cater & Co., Limited, had no subscribed capital, and its trading was throughout carried on at a loss. On January 19, 1894, a receiver for the debenture-holders was appointed by the Court.

"In July, 1895, the Court sanctioned the sale of the property and assets of Cater & Co., Limited, for 8543*l.*, which was the amount of a valuation made under the directions of the Court.

"On November 6, 1895, a compulsory winding-up order was

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made against Cater & Co., Limited, which at that time had liabilities amounting to 50,000*l.*, and assets completely covered by debentures, taken at the valuation of 8543*l.*

"On February 13, 1896, a new limited company called W. Cater & Co., Limited, was registered, with a nominal capital of 35,000*l.*, in shares of 1*l.* each, with the object of acquiring and carrying on the business previously carried on by Cater & Co., Limited.

"In August, 1897, W. Cater & Co., Limited, passed a resolution for voluntarily winding-up, and is now in voluntary liquidation."

The report then referred to a statement in the prospectus that the books of the various firms had been examined by some firms of chartered accountants (whose names were given), and that their reports had been submitted to another firm of accountants, who were the company's auditors, and that they had given the directors a certificate of profits, dated July 26, 1897, which stated (inter alia): "These certificates, together with our own, shew that, after deducting all trade expenses, but without allowing partners' drawings, the aggregate net profits of the businesses which you have contracted to purchase are 15,790*l.* 5*s.* 11*d.* per annum, taken to December 31 last. The businesses are progressive, and in our opinion capable of considerable extension." This certificate added: "The aggregate net profits of the said businesses appear from the accountants' certificates to have been made up as follows (inter alia)—W. Cater & Co., Limited (general business), 1465*l.* 18*s.* 8*d.*, and (contract business) 2557*l.* 12*s.* 6*d.*"

The report continued: "(17.) The following statements also appear in the prospectus:—

"'From these figures it will be seen that, after meeting the charges on the 6 per cent. preference shares, which will amount to 5400*l.* per annum, there will remain a balance of 10,390*l.* 5*s.* 11*d.* A dividend of 8 per cent. on the ordinary shares will absorb 7200*l.*, leaving for reserve fund and administrative expenses 3190*l.* 5*s.* 11*d.*

"'The economies, especially in the purchase of materials, which will be effected by the centralization and the additional

working capital will necessarily insure substantially increased profits, so that a 10 per cent. dividend on the ordinary shares should be earned from the commencement of the company.'

"The original certificates of the various accountants referred to in the above letter from Messrs. Alfred Beavis, Nerney & Co. (the company's auditors) were not set out in the prospectus.

"It appears from the said certificates (inter alia) that the profit of Cater & Co. was for the year 1896, and it included a net profit of 2557*l.* derived from special contract work not undertaken by the company.

"(18.) The following statement also appears in the prospectus:—

"'The only contract entered into by or on behalf of the company is dated the 28th July, 1897, and is made between the Contract Company, Limited, of the one part, and the company of the other part, which provides for the acquisition of the businesses as from the 31st July, 1897.'

"This is contrary to the fact, as there were separate agreements between the original vendors and the promoters, which provided for the company acquiring the businesses.

"(19.) As a result of the issue of the prospectus subscriptions were received for 8895 preference and 1242 ordinary shares, making a total subscription of 5117*l.*, and upon this subscription the directors proceeded to allotment at a board meeting held on the 11th August, 1897, at which Messrs. Shoolbred & King, directors, and Mr. C. T. Fox, the Secretary, were present. The directors who were present at that board meeting state that they were induced to go to allotment on the assurance of the promoters that shares had been underwritten to the extent of 100,000*l.*, but that they afterwards ascertained that the underwriters were unable to fulfil their liability when called upon to do so.

"(20.) At the board meeting of August 11, 1897, at which the directors made the allotment, instructions were given to complete the purchase of the business of W. Cater & Co., Limited, the purchase price of which had been fixed by the contract of July 28, 1897, at 55,000*l.*, payable 20,625*l.* in cash, 17,187*l.* 10*s.* in shares, and 17,187*l.* 10*s.* in cash or shares at

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the option of the company. The directors state that the purchase consideration was based upon the value of the assets of W. Cater & Co., Limited, which consisted of book debts, valued at 10,000*l.*, stock 3000*l.*, lease, fixtures, &c. 5000*l.*, and goodwill estimated at 37,000*l.* No valuation was made on behalf of the company. The purchase was carried through by the payment of 43,000*l.* in the manner set out in the next paragraph, and by the issue of 12,000*l.* of 5 per cent. debentures, secured by a charge upon the assets acquired from W. Cater & Co., Limited.

"(21.) In order to carry out the purchase the promoters, through nominees, subscribed for 32,000 preference and 7500 ordinary shares, which were allotted to them on August 20, 1897. Upon that date they paid for the shares by cheques amounting to 39,500*l.*, and received in exchange from the company a cheque for 41,500*l.* in part payment of the purchase-money. The balance of the purchase price payable in cash, viz., 1500*l.*, was paid to the vendors on September 23, 1897.

"(22.) In disposing of the business of W. Cater & Co., Limited, to the company for 55,000*l.*, the promoters made a profit of 20,000*l.*, which was not disclosed to the shareholders of the company.

"(23.) Owing to the insufficient subscription no other business was acquired. Deposits amounting to 1100*l.* were, however, paid and forfeited, in connection with contracts to purchase the businesses of Ascher & Co. and Harman & Co.

"(24.) At the time of the formation of the company Mr. H. C. Wilson, the liquidator of W. Cater & Co., Limited, addressed a letter to the Contract Company, certifying that the book debts of W. Cater & Co., Limited, on January 1, 1897, amounted to the sum of 10,343*l.* 3*s.* 3*d.* This sum was included in a larger amount of 13,843*l.* 3*s.* 3*d.*, stated in the prospectus to be the amount of the book debts which the company would acquire under the purchase agreement. In or about September, 1897, or a month after the business of W. Cater & Co., Limited, was taken over by the company, certain creditors of W. Cater & Co., Limited, claimed that, of the 10,343*l.* 3*s.* 3*d.* book debts which were to be assigned to

the company, book debts to the amount of 1740*l.* had been assigned to them by W. Cater & Co., Limited, prior to the transfer of the business to the company. The directors of the company state, however, that it was not until December, 1897, that they became aware that the creditors referred to claimed some of the book debts, and that they at once repudiated the claims made, and discharged the manager of the company, Mr. W. de Wilde Cater, in consequence of his having without their knowledge given effect to the charges in question.

"(25.) The company carried on business as military accoutrement makers at 56, Pall Mall, and Thurlow Works, Blackfriars. During the short time it was in existence it traded at a loss.

"(26.) The statement of affairs filed by the directors returns the total assets at 7313*l.* 5*s.* 2*d.*, being 4686*l.* less than the claims of the debenture-holders. The liabilities to unsecured creditors amount to 781*l.* 16*s.* 2*d.*, and there is a deficiency, so far as creditors are concerned, of 5468*l.* 11*s.* The share capital has been entirely lost.

"The official receiver is of opinion that fraud has been committed by the persons named in the schedule hereto in the promotion or formation of the company, or in relation to the company since the formation thereof."

In the schedule the name of Mr. Long appeared, and it was stated that he was "one of the promoters of the company."

On the application of the official receiver an order was made ex parte in chambers for the public examination of Mr. Long.

Mr. Long moved in Court for the discharge of this order. The motion was heard before Wright J. on November 25, 1898.

Herbert Reed, Q.C., and *Cababé*, for the motion.

Ingle Joyce, for the official receiver. There is a preliminary objection that the application is out of time. The order for the public examination was made on July 22, 1898, and the day fixed for taking the examination was August 2. The applicant had notice of the order, and he ought to have moved to discharge it within fourteen days, the time limited for

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appealing from an interlocutory order by the Rules of the Supreme Court, Order LVIII., r. 15. The examination has now been fixed for November 28, and the application is too late.

Herbert Reed, Q.C., for the motion. The application was made before the registrar in July, and was adjourned.

[WRIGHT J. I suppose I have power to extend the time. At any rate, before deciding the preliminary point I will hear what is to be said against the report.]

The report is not sufficient as a foundation for an order under s. 8 of the Companies (Winding-up) Act, 1890. In so far as the applicant is charged as a promoter, the only allegation is in general terms at the end of the report, and that is a mere non sequitur. *Ex parte Barnes* (1) decides that the report must make an allegation of facts which, if admitted, would shew that fraud has been committed in the promotion or formation of the company, if a promoter is to be examined. As Lord Halsbury L.C. says: "Such facts must be found by the official receiver as suggest fraud against the person incriminated." (2) A mere general charge, without a statement of the facts on which the charge is made, is insufficient. There is nothing stated in this report to connect the applicant with the promotion or formation of the company, or with any fraud, and there was no jurisdiction on such a report to make an order for his public examination.

Ingle Joyce, for the official receiver. The report is sufficient. It is the "further report" mentioned in sub-s. 2 of s. 8, and it strictly complies with the words of the clause.

Cababé, in reply.

WRIGHT J. I have no doubt that the actual notice of motion to rescind the order for public examination was given too late, and, even if the motion had succeeded, I should say that it ought to be without costs, because it is quite unreasonable to hold a motion of this kind over until the eve of the examination, and so possibly defeat the very objects for which the examination was to be held. It must be understood that persons who want to discharge orders of this kind must come

(1) [1896] A. C. 146. (2) [1896] A. C. 152.

within a reasonably short time. It may be that they ought to come within fourteen days; that is a matter for consideration. I feel no doubt that this report is sufficient for the purposes of a public examination. There is abundant evidence in the statements (much more perhaps is stated than need have been stated) that fraud of a gross kind was committed by some persons in the formation of this company. That is the first step under s. 8, sub-s. 2, "in the promotion or formation" of the company. Moreover, there is in the statements some evidence—not cogent or conclusive evidence, but some evidence tending to shew—that Mr. Long was to some extent implicated in the fraud, and the official receiver reports that, in his judgment, Mr. Long was so implicated. I cannot imagine that anything more is necessary. It seems to me that the official receiver is regarded by the Legislature as an officer in a high position, especially competent to form an opinion on matters of this kind. He is somewhat in the position of a magistrate in London who has to consider whether he will commit persons for trial, and all that the Court has to see is that the official receiver states matters shewing that he can reasonably come to the conclusion that there was fraud on the part of the particular person against whom his report suggests it. I entirely agree with Mr. Ingle Joyce that these reports are not intended to be drawn with the accuracy of a bill in equity or a pleading. I think that the House of Lords in *Ex parte Barnes* (1) defined the outside limits of that which these reports ought to contain. In my judgment, if more were required than has been stated in the present case, no order for public examination under this section could be made, unless there were practically a previous trial by the official receiver of the questions with which he has to deal in his report. That was not intended. It was only intended that he should say that, in his judgment, there is a primâ facie case, and to shew in his report that his judgment is based on facts which render it not unreasonable.

The motion must be refused with costs.

F. E.

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Mr. Long appealed. The appeal was heard on December 14, 1898.

Herbert Reed, Q.C., and *Cababé*, for the appellant. The report of the official receiver does not shew any sufficient foundation for the finding that Long was one of the promoters of the company. It states that the Contract Company were the promoters, and that Long and other persons named were "concerned in the promotion." Long had nothing to do with the obtaining of a profit of 20,000*l.* by the Contract Company on the sale to the Civil, Naval, and Military Outfitters Company. There is nothing to shew that Long had anything to do with the issue of the prospectus of the latter company. It is extremely difficult to understand from such a report what the charge is from which Long has to exculpate himself. The judgments of the House of Lords in *Ex parte Barnes* (1) shew that in his further report the official receiver ought to state facts which afford a ground for his opinion that fraud has been committed by the person or persons against whom he charges or suggests it. The persons against whom he makes or suggests the charge must either have taken part in the promotion or formation of the company, or must have been directors or officers of the company, and the charge must be stated in such a way that the person implicated may know how to exculpate himself. Here the official receiver has stated the charge in too general terms. Facts should be stated from which a charge of fraud may be inferred. This has not been done here. It might, for instance, have been stated that Long assisted in the preparation of the prospectus, and that in the opinion of the official receiver he had committed a fraud in the prospectus. No objection could have been raised to such a report. As it is, Long does not know what charge he has to meet. The report only shews that he sold his option to the promoters of the company; it does not shew that he received any part of the profits of the promotion. In no other way did he take part in the promotion. His agreement to sell his option to the Contract Company does not make him a promoter of the Civil

(1) [1896] A. C. 146.

Company: *Gover's Case.* (1) The report says that Long was "concerned" in the promotion. That may mean that he was "interested." As vendor he had, no doubt, an interest in the matter; but it by no means follows that he took part in the promotion. He might be able to exculpate himself from a charge of fraud in the promotion or formation of the company; but that would not exculpate him from the charge, which is also apparently made against him, of fraud in relation to the company since its formation. The official receiver could obtain a full examination under s. 115 of the Companies Act, 1862, and then, if necessary, he could make a further report. If the official receiver is not obliged to do more than state his opinion, the judge cannot exercise any discretion in the matter. The official receiver would be the sole arbitrator: *In re Great Kruger Gold Mining Co.* (2)

Sir R. B. Finlay, S.-G., and *Ingle Joyce*, for the official receiver. By rule 69 of the Companies Winding-up Rules, 1890 (made under the Act), the official receiver's report is to "state in a narrative form the facts and matters" which he desires to bring to the notice of the Court, and his opinion as required by s. 8 of the Act. The report in the present case does this, and distinctly charges Long with fraud "in the promotion or formation of the company." The words of the final clause should be read reddendo singula singulis. The charge of fraud in the promotion or formation of the company applies to the promoters; the charge of fraud "in relation to the company since the formation thereof" applies to directors or officers of the company. Long was not a director or officer, but the report shews clearly that he took part in the promotion or formation of the company, and the facts which are stated amply justify that conclusion, and also the opinion expressed that he committed a fraud. The report shews that the business of Cater & Co. was absolutely worthless, and that Long must have known this.

[VAUGHAN WILLIAMS L.J. How does the schedule limit the charge against Long to the promotion or formation of the company?]

(1) (1875) 1 Ch. D. 182. (2) [1892] 3 Ch. 307.

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Paragraph 19 of the report is aimed at the directors, not at Long. When Long entered into the agreement with the Contract Company to sell them this worthless business for 35,000*l.*, he must have known that that company could not pay the money, except by means of the formation of a new company to purchase the business. If the report is read in its natural meaning, it shews clearly that Long took part in the formation of the Civil Company. The decision in *Ex parte Barnes* (1) was only this—that a general charge of fraud is not enough to give the Court jurisdiction under s. 8; there must be in the report a charge of fraud against the person whom it is sought to examine. It was not intended that there should be a preliminary hearing by the judge of the question whether there is a primâ facie case of fraud against the person whom it is sought to examine. The official receiver was to decide this; and then the judge has a discretion whether he will act on the report. The opinion of the official receiver governs the jurisdiction, and the judge has a judicial discretion as to acting upon the opinion. But the Court cannot act without the opinion of the official receiver.

[CHITTY L.J. Is paragraph 21 a charge against Long?]

No; it is a charge against the Contract Company. If the Court has not jurisdiction in such a case as the present, s. 8 will be practically useless. The judge has exercised his discretion rightly. If the Court has jurisdiction, the exercise of the discretion of the judge cannot be questioned: *In re New Travellers Chambers.* (2) It should be assumed that Long knew all about the prospectus, for he has not denied that he did.

Herbert Reed, Q.C., in reply. Long could not be heard on the application, and could not therefore deny that he knew anything of the prospectus. The report only says that he was "concerned" in the promotion of the company. That is an ambiguous word, and it is not to be found in s. 8. If it means that Long took part in the promotion, it would have been easy to say so. There is nothing stated in the report which shews that he did take part in the promotion. No

(1) [1896] A. C. 146. (2) [1895] 1 Ch. 395.

charge is made against Long from which he can exculpate himself. The effect of the decision in *Ex parte Barnes* (1) is that the report should state facts which shew that a fraud has been committed, and that the person whom it is sought to examine was a party to it. This has not been done in the present case.

LINDLEY M.R. I do not think there is any difficulty in coming to a proper conclusion, though the case has occupied a very long time in argument.

The appeal is against the refusal of Wright J. to discharge an ex parte order for the examination of Mr. Long, the appellant, under s. 8 of the Companies (Winding-up) Act, 1890. That section has been read and commented upon so often that I need not now read it at length. It has been the subject of a great deal of litigation in this Court as well as in the House of Lords; and in *Ex parte Barnes* (1) a construction has been put upon it by the House of Lords which, of course, we must all accept.

Now, there are two questions which have to be determined on this section. *Ex parte Barnes* (1) has settled one point in controversy, namely, what is the "report" referred to in sub-s. 2 when it says, "The official receiver may also, if he thinks fit, make a further report," and, by sub-s. 3, "the Court may, after consideration of any such report, direct" a public examination of certain persons. *Ex parte Barnes* (1) has made it plain that "such report" is the "further report," and not what is called in sub-s. 1 the "preliminary report." Then sub-s. 2 says what the official receiver may state in his further report. He is to state "the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court." Then sub-s. 3 says, "The Court may, after consideration of any such report, direct that any person who has taken

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any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court" for public examination. Then sub-s. 7, which is very important, must be read in connection with those two sub-sections; and the great value of the decision in *Ex parte Barnes* (1) is that it has shewn how those three sub-sections are to be woven together so as to produce one harmonious whole, and make the Act work justly. On the one hand, this s. 8 is one of the most beneficial to be found in the whole of the Companies Acts, and it is so beneficial that attempts were made at first to stretch it to an extent which was hardly just to the person who had to undergo the ordeal of a public examination, which is a serious matter. It was attempted to stretch the section so as to give the judge jurisdiction to order public examinations upon reports which, in the judgment of every Court to which the question was submitted, were insufficient for the purpose. It was such a report which the House of Lords had before them in *Ex parte Barnes*. (1) One result of *Ex parte Barnes* (1) appears to me tolerably plain. There must be a report stating the manner in which the company was formed, and whether in the opinion of the official receiver fraud has been committed by the person whom it is proposed to examine. That qualification is not to be found expressly in the Act itself: it was inferred by the House of Lords in *Ex parte Barnes*. (1) And they were led to infer it by construing sub-s. 3 in connection with sub-ss. 2 and 7. If, however, a report were so expressed as to comply literally and textually with the language of sub-s. 2—if it stated simply the manner in which the company was formed, and that, in the opinion of the official receiver, a fraud had been committed by persons named, and you could not find in the report any connection between those persons and the manner in which the company was formed, although the language of sub-s. 2 might be textually and literally complied with, I should hesitate long before I said that such a report was sufficient under that sub-section. I do not think any judge would act upon such a report as that in ordering a public examination. Indeed, I

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doubt whether any judge could judicially and properly act on such a report. But, on the other hand, if you find the official receiver reporting that specified persons have, in his opinion, been guilty of fraud in connection with the formation of the company, and you look back into the report and see, not whether the charge against those persons is proved (that is not the function of the report), but whether there is such a basis for that opinion as in the view of the judge warrants him in calling upon those persons to undergo a public examination, that, I think, is all that the report need do. This, as it seems to me, is the fair and true result of the language of the Act and the decision in *Ex parte Barnes*. (1)

Now, taking this report, at the end of it the official receiver says that he is of opinion "that fraud has been committed by the persons named in the schedule hereto in the promotion or formation of the company, or in relation to the company since the formation thereof"; and then in the schedule we find the name of Mr. Long, who is there described as "one of the promoters." So that, as I read it, the official receiver is of opinion that fraud has been committed by Mr. Long in the promotion or formation of the company, or in relation to the company since the formation thereof. To the latter part I do not attach much importance.

Next, is Mr. Long so connected in the prior narrative with the formation of this company as to afford a basis for that opinion? In my opinion, an ample basis for it is to be found in the report. I do not mean to say that this report is expressed in such a form as I should like to see. It is not. With a very little trouble it might have been made plainer, and there would not then have been room for all this controversy. In the first place, I think the language of paragraph 2 is objectionable. It says, "The promoters of the company were the Contract Company." When you read the whole of the report it is clear what that means. The Contract Company brought out this company. Then paragraph 2 goes on: "The persons concerned in the promotion of the company" were several persons named, among them Mr. Long. What does "concerned" mean? It is not

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found as a fact that he "took any part in the promotion or formation of the company," which is the language of sub-s. 2. Of course, this led to a discussion about the meaning of the word "concerned." It was said that Mr. Long was "concerned" in some other way in the promotion or formation of the company, and did not take part in it. I do not so understand it. I understand the finding to be that he was "concerned" by taking part in the definite formation of the company. Then the report goes on to say that the Contract Company acquired an option of purchasing the business of Cater & Co., which is what Mr. Long had to sell, for the sum of 35,000*l.* Then the report states (in paragraph 5), with regard to Cater & Co., "that it has transpired that the Contract Company were introduced by Mr. Rhys, who afterwards became a director of the company, to Mr. Long, who at that date was entitled by agreement to acquire the assets of Cater & Co., and that, as commission or remuneration for the introduction, Mr. Rhys was to be entitled to one-half of the net profits made by Mr. Long on the sale to the company." Now, put those two facts together. Mr. Long was about to sell these assets to the Civil Company for 35,000*l.*, and to give Mr. Rhys half his net profit for the introduction. What was the value of that which he was going to sell? 35,000*l.*? The notion is absurd on the face of it. Then, in paragraph 15, we find that in 1895 these assets were sold at a valuation under the sanction of the Court for 8543*l.* I do not say that no alteration in the value had taken place in the interval. The report does not state minutely what the effect of the trading of this company was between the time when the assets were bought for 8543*l.* and the time when they were sold for 35,000*l.* But it is stated in paragraph 18 that there were separate agreements between the original vendors and the promoters (by which I understand, as regards this matter, Mr. Long and the Contract Company) which provided for the Civil, Naval and Military Outfitters, Limited, acquiring the businesses.

Now, putting these facts together, is there not some basis for the opinion of the official receiver "that fraud has been committed by Mr. Long in the promotion or formation of

this company"? I do not say that this charge is proved in such a way as would authorize a court of civil jurisdiction to compel Mr. Long to make good the profits which he has made; still less do I say that there is such a charge as Mr. Long should be called upon to meet in a court of criminal jurisdiction. The question we have to consider is whether this report is so flimsy, so sketchy, so unfair that Wright J. exceeded his jurisdiction, or exercised his discretion wrongly, in saying that Mr. Long ought to be publicly examined under the provisions of the Act. In my judgment, although the report might have been plainer (and I hope that on any future similar occasion the report will be plainer, so that we shall not have to waste a day in discussing the matter), this report gave Wright J. ample jurisdiction to make the order, and that he exercised his discretion in the way in which I myself should have exercised it. In my opinion, this appeal wholly fails, and should be dismissed with costs.

CHITTY L.J. I agree, and, after what has fallen from the Master of the Rolls, with whose opinion and with whose reasons I entirely agree, I will add very little.

The first question is, whether there was jurisdiction to make the order. The report is in the narrative form, stating the facts and matters which the official receiver desires to bring to the notice of the Court, and his opinion, as required by s. 8 of the Act of 1890, and in conformity with rule 69 of the Rules made under that Act. The statute requires that in his further report, which is the only one with which we have now to deal, the official receiver should state the manner in which the company was formed. He has done this. Then he is to state whether, in his opinion (and he has done this), any fraud has been committed by any person in the promotion or formation of the company.

I stop there, because that is sufficient for the present purpose. I agree that, if the report of the official receiver merely stated the manner in which the company had been formed, and then, without shewing any connection between the facts as stated and his opinion, which came, as it were, suddenly at the

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end of the report, that A. B. had been guilty of fraud in the promotion or formation of the company, such a report, though it might in words comply with the requisitions of the statute, would not be one upon which any judge would act, when he came, under sub-s. 3, to take it into consideration. It is the judge who has to direct whether a public examination shall take place.

Now, what is the report in this case? It has been very fully described by the Master of the Rolls, and it appears to me that it contains a substantial basis for the opinion which is expressed at the end of it. The official receiver in the last paragraph states his opinion "that fraud has been committed by the persons named in the schedule in the promotion or formation of the company, or in relation to the company since the formation thereof"; and then there is a schedule, which states the names of several gentlemen and their connection with the company. I do not say (nor did the Master of the Rolls say) that this report is drawn in as good a form as it might have been. I think it might have been in several respects more particular, and even in the matter which I am about to mention. In the schedule Mr. Long is stated, under the heading "Connection with Company," to be "one of the promoters." It may be that the charge against him as it is stated is a little too wide, so that, as has been suggested, it may include acts subsequent to the formation of the company—acts not done by him as promoter. But the answer to this, as it appears to me, is, that the report is not meant to be an indictment, or a statement of claim to charge a man with fraud. The object of the report is to raise a primâ facie case of fraud—not a case which a man has to answer finally, but a case upon which a judge has to decide whether he is to undergo a public examination. And all that results from the public examination is that, as sub-s. 7 says, his answers "may thereafter be used in evidence against him." I do not see that the Act requires that the charge against him should be formulated in any strict and precise manner. But I think it is only fair—and the official receiver will no doubt in any future report bear this in mind—that he should endeavour to reduce to as precise a point as he can the

nature of the charge. As the House of Lords have said, all these sub-sections are to be read together and reconciled, and sub-s. 7 says that the person against whom a charge is "made or suggested" may exculpate himself. So that, according to the language which the Legislature has used in this sub-section, a suggestion of fraud may be made against the persons whom the judge directs to be examined.

Then, again, the report states that the promoters of the company were a company which is called the Contract Company, and immediately after that it mentions Mr. Long and some other persons as being "concerned in the promotion of the company." I think it would have been much better to use the term which is to be found in the Act—namely, "taking part in the promotion or formation of the company." But I have no hesitation in saying that this paragraph of the report (which again, I repeat, is not to be read like an indictment) is intended to point out that Mr. Long took part in the promotion of the company, and it is in respect of his taking part in the promotion of the company that he is charged with fraud.

There is one other point which I think worthy of mention—namely, that in this narrative there is a statement of Long's agreement to sell to the Contract Company. What was that company? It never had a greater subscribed capital than 35*l.*, and yet Mr. Long, who had some option which is not stated in the report to buy Cater's business (which had gone through a series of disasters), sells Cater's business to the Contract Company for 35,000*l.*, of which 25,000*l.* was to be paid in cash and 10,000*l.* in shares of a company which was to be formed by the Contract Company—that is this company, now in liquidation. That is one of the facts (the Master of the Rolls has called attention to many others) which presents a very serious aspect, and it forms a part of what I consider a substantial ground for the judge's direction that a public examination of Mr. Long shall take place.

I will not pursue the history of the Cater business; that has, I think, already been sufficiently dealt with. But here you have Mr. Long (I mean on the report; I am not saying a word

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against him in any other respect) evidently endeavouring to pass off upon the public a business which is of very little value through the medium of a contract with the promoting company, which company had only got 35*l.* in money and never had any more. I think that is a case which demands inquiry. And I think that probably Mr. Long, if he had not been advised to contest the matter, would have willingly said, "I will face any public inquiry in regard to this matter, and I can explain it all."

With regard to *Ex parte Barnes* (1) I have nothing to add, except to point out that in that case no charge of fraud was made in the report against the persons whom it was sought to examine, nor was there any statement of fact from which fraud could be inferred against those persons.

For these reasons I agree with the Master of the Rolls.

VAUGHAN WILLIAMS L.J. Two questions have been raised: (1.) whether the learned judge had jurisdiction to make this order; (2.) whether he exercised a proper judicial discretion in making it.

Now, whatever may have been the view taken as to the conditions precedent to this jurisdiction before the decision of the House of Lords in *Ex parte Barnes* (1), certain conditions precedent to the exercise of the jurisdiction have by that decision been placed beyond the possibility of doubt. In the first place, it is not sufficient that there should be the general preliminary report of the official receiver; there must be also his "further report" under sub-s. 2 of s. 8. In the next place, the "further report" must find fraud, and it must find fraud as against the persons of whom a public examination is asked. Lastly, there can be no doubt that these persons must fall within the categories mentioned in sub-s. 3. [His Lordship read sub-s. 3.]

It does not mean that it is to be proved as a matter of fact that the person in question does come within the category; it means that the report must state that he comes within it.

As to those conditions precedent there is no doubt. There

(1) [1896] A. C. 146.

may be more question as to what the nature of the finding of fraud against the individual must be before the jurisdiction arises, and to a certain extent we have to look at sub-s. 7 in order to obtain guidance as to this.

Speaking for myself, I should hesitate very much to say that a mere statement of "the manner" (to use the very words of sub-s. 2) in which the company was formed, coupled with a statement that, in the opinion of the official receiver, a fraud had been committed by a person named, would be sufficient to justify an order for the examination of that person. I do not say that the judgment of the House of Lords in *Ex parte Barnes* (1) is at all conclusive on this point. But still it does suggest that the statement of that opinion by the official receiver must be in such a shape that it can be said that there is a charge made against the person sought to be examined—a charge of such a kind that he can either exculpate himself or be incriminated. In my judgment that is essential to the exercise of the jurisdiction, though the decision of the House of Lords does not say so in so many words. But the spirit of that decision is that you are not to make an order for the examination of any one unless he falls within those categories, and unless the judge is satisfied on the report that it makes such a charge against the person sought to be examined that he can see from what it is that he must exculpate himself, or, if he fails to do so, be incriminated. In my judgment the report in this case is on the border line in both respects, so far as the jurisdiction is concerned.

I think it is a great pity that this report not only does not use the words "took part in the promotion" (although I do not think that much stress should be laid on the use of the very words of the section), but also, from the beginning to the end, carefully avoids stating those facts from which it might be inferred that Mr. Long, the person sought to be examined, took part in the promotion.

Let us see what the facts stated are. They are stated in rather an inverse order. In order to follow the chronology, I think paragraph 3 of the report should be read before

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paragraph 2. [His Lordship read paragraphs 3, 5, and 2, and continued:—]

The Contract Company was not a mushroom company formed ad hoc, but it had been in existence many years. Thus far no fact is stated which shews that Mr. Long took any part in the promotion, or that he was concerned in the promotion of the Civil Company in any other way than that he had done the things mentioned in paragraph 5—that is, having an option of buying the business of Cater & Co., Limited, he, being introduced to the Contract Company by Mr. Rhys, agreed to pay Mr. Rhys a commission for his having obtained a purchaser of the option.

There is not another syllable, so far as I can see, from beginning to end of this report which shews that Mr. Long took any part in or did anything in respect of the promotion. There are statements which shew that Mr. Long would have derived a very large profit from the sale to this company, now in liquidation, because it is plain that the Contract Company could not have paid the purchase-money out of their own means, and that they were only a promoting company, who intended to pay the purchase-money out of the profit which they expected to make from the company which they were endeavouring to form to purchase the assets. There is no statement of anything which Mr. Long did in the course of the promotion of this purchasing company. It also appears from the report that in July, 1895, the Court sanctioned the sale of the property and assets of Cater & Co., Limited, for 8543*l.*, and there are statements as to the moneys earned by Cater & Co., which do not seem to have exceeded (to put them at the highest) 8000*l.* So it is perfectly plain upon the face of the report that Mr. Long was to get a very handsome price for that which he was selling to the Contract Company, and through them to this purchasing company which was to be formed by them.

I can only say that, in my judgment, it is highly undesirable that a report should be drawn in this form; and, although I cannot take upon myself to say that Wright J. exercised his discretion wrongly, I confess that I should myself have felt

considerable hesitation before I drew the inference that the report sufficiently stated that Mr. Long took part in the promotion of the company.

Then, coming to the form of the charge of fraud which appears in the final clause of the report, that clause is in fact a transcript from sub-s. 2 of every possible matter as to which such a charge could be made, and in the schedule it is said that Mr. Long was one of the promoters of the company. It is said that, although this finding of the official receiver is in so vague a form that it only amounts to saying that the persons respectively named had been guilty of one or other of the offences mentioned in sub-s. 2, yet it means that Mr. Long was guilty of this offence—namely, that he promoted this company in order that it should purchase a business which was worthless, and worthless to his knowledge. I think that it would be straining the language of the report very far to say that you can find in it either such a definite charge against Mr. Long, or facts upon which such a charge could be substantially based.

But, again, this is a question of fact, and Wright J. was satisfied as to both points. He was satisfied that the report sufficiently states that Mr. Long took part in the promotion or formation of the company, and he was satisfied that the report sufficiently finds fraud against Mr. Long. I cannot say that with regard to either of those matters there is nothing in the report to support the finding; and under these circumstances I do not feel justified in differing from Wright J. But I must add that I think that to accept as sufficient the meagre statements which are made on either of these two points would not be to act in accordance with the spirit of the decision of the House of Lords in *Ex parte Barnes*. (1) The spirit of that decision, to my mind, is that in dealing with this section you ought not only to consider the interests of the company, the shareholders, and the public in obtaining all possible information in a case in which the facts shew that some one has been guilty of gross fraud, but you ought also to take care not to subject any person to a public examination merely because

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you are satisfied, or because the official receiver is satisfied, that some one or other has been guilty of fraud. The spirit of that decision is that you ought not to subject any one to a public examination unless you are satisfied on the report that the official receiver has come to the conclusion, and upon some substantial grounds, that a charge of fraud is disclosed by the facts against the person whom it is sought to examine—such a charge that he may understand what it is from which he will have to exculpate himself, and with which it is sought to incriminate him.

I must express my earnest hope that our decision in this case may not be considered a precedent for reports of this character by the official receiver, and that in future, if he intends to say that a specified person ought to be examined because he has taken part in the promotion or formation of a company, he will either say that in so many words, or will make statements of fact from which it can be inferred, and if he means to say that that person not only took part in the promotion, but also in so doing committed a fraud, he will say so in definite terms.

LINDLEY M.R. The appeal will be dismissed with costs.

Solicitors: *J. Westcott; Solicitor to Board of Trade.*

W. L. C.

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[1897 E. 818.]

Commonable Rights—Agreement for Sale—Action for Specific Performance—Counter-claim—Finding of Jury on Trial of Issue of Fact—Motion for New Trial—Evidence—Admissibility—Reputation—Deposition in Suit to perpetuate Testimony—Survey and Report as to Manor made under Statute.

In an action in the Chancery Division by a statutory committee of commoners for specific performance of an agreement to purchase commonable rights, an order was made directing the trial before a jury in the Queen's Bench Division of the following issue of fact, namely, whether a certain piece of land was common land or subject to any commonable rights either of the commoners of the parish of C., or of the commoners of the parish of L.:—

Held, that evidence of reputation was admissible on the trial of such an issue.

Earl Dunraven v. *Llewellyn*, (1850) 19 L. J. (Q.B.) 388, 392; S.C. 15 Q. B. 791, and *Warrick* v. *Queen's College, Oxford*, (1871) L. R. 6 Ch. 716, observed upon.

A deposition made in the year 1815, in a suit to perpetuate testimony by a witness examined on commission on behalf of a predecessor in title of the defendants, was admitted in evidence at the trial of this issue as being a statement made by a person vouched by the party on whose behalf the deponent was examined, and consequently an admission by conduct of a predecessor in title of the defendants. This deposition had been sealed up by the examiners, but was now found unsealed: —

Held, that the mere fact that the deposition was now found to be unsealed was not evidence of user or adoption by the party on whose behalf the deponent was examined, and that, in the absence of evidence of such user or adoption, the deposition was inadmissible on the ground on which it was admitted.

Richards v. *Morgan*, (1863) 4 B. & S. 641, observed upon.

A survey and report made by a surveyor in 1816, in discharge of a duty imposed upon him by the 8th section of the statute 34 Geo. 3, c. 75, upon the occasion of a sale of Crown lands, and produced out of the proper custody, is admissible in evidence as a public document within the decision in *Sturla* v. *Freccia*, (1880) 5 App. Cas. 623. *Phillips* v. *Hudson*, (1867) L. R. 2 Ch. 243, distinguished.

MOTION for a new trial.

This was a motion on behalf of the defendants, the urban district council of Merthyr Tydfil, that the finding of the jury

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on the trial of an issue of fact directed to be tried by an order made in this action by Romer J. on March 14, 1898, might be set aside, and that a new trial might be had between the parties.

The action was brought in the Chancery Division in July, 1897, by five gentlemen as a statutory committee of commoners, on behalf of themselves and all other the persons entitled to commonable rights in or over the common lands in the parish of Cantref, in the county of Brecon, in order to enforce specific performance of an agreement dated May 18, 1895, and made between an agent for the commoners of the parish of Cantref of the one part, and the defendants of the other part, as to the taking by the defendants for the purposes of the Merthyr Tydfil District Council Waterworks Act, 1895, of certain common lands.

In August, 1897, the plaintiffs delivered a statement of claim in which they alleged (inter alia) as follows: That before the passing of the last-mentioned Act they had opposed the bill introduced in Parliament by the defendants in order to obtain the powers, afterwards conferred on them by the Act, to construct waterworks, and for that purpose to take parts of Cantref Common; that, as the result of negotiations between the plaintiffs and the defendants, the agreement of May 18, 1895, was entered into; that it was thereby agreed that the plaintiffs should withdraw their opposition to the bill; and that, in pursuance of the powers of the Lands Clauses Consolidation Act, 1845, they agreed that the compensation for the extinction of their commonable rights should be the sum of 40*l.* per acre, on payment whereof the defendants might by deed-poll vest the lands in themselves, discharged from all commonable rights, and should be entitled to immediate possession; and the plaintiffs further alleged that they withdrew their opposition, that the bill passed, and that the defendants had taken possession of lands forming part of Cantref Common amounting to 34A. 2R. 3P., but had refused to pay or provide for payment of the compensation payable under the agreement; and the plaintiffs claimed specific performance of the agreement, an account of principal moneys

and interest due under it in respect of the lands forming part of Cantref Common taken by the defendants, and payment thereof, with ancillary relief.

The defendants, the urban district council, delivered a statement of defence in which they admitted that one portion of the 34A. 2R. 3P. was commonable land within the manor and parish of Cantref and part of Cantref Common; and they alleged that they had paid into court in satisfaction of the plaintiffs' claim the purchase-money and interest payable in respect of this portion. They also admitted that a second portion of the 34A. 2R. 3P. was commonable lands either of the parish and manor of Cantref or of the parish and manor of Llanfrynach, and that the commoners of one or other of those manors or parishes (the commoners of each of which claimed the same) were entitled to the purchase-moneys and interest payable in respect of that second portion; and they pleaded that they were ready to pay such purchase-moneys and interest into court, or otherwise to deal with the same as the respective committees of such commoners should decide, or the judge should direct, to abide the determination of the dispute between the commoners of Cantref and the commoners of Llanfrynach. But as to 8A. 1R. 24P., the remaining portion of the 34A. 2R. 3P., the defendants, the urban district council, alleged that such 8A. 1R. 24P. were not commonable lands of the commoners either of the parish and manor of Cantref or of the parish and manor of Llanfrynach, but were private freehold to which the said defendants were entitled in fee simple in possession; and, further, that even if the 8A. 1R. 24P. ever were common lands or subject to commonable rights of the commoners of either of those parishes, the respective rights of such commoners had been extinguished by the operation of the Statutes of Limitations, 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57. And the defendants counter-claimed against the plaintiffs and the committee of the commoners of Llanfrynach that (inter alia) the rights of the respective commoners of Llanfrynach and Cantref in the second portion of the 34A. 2R. 3P., and the purchase-moneys and interest payable in respect thereof, might be determined, and that it might be declared the 8A. 1R. 24P. were

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free from all commonable rights either of the commoners of Llanfrynach or of Cantref.

An arrangement was made out of court by the committees of the two sets of commoners with regard to the division of the money paid into court in respect of the said second portion of the 34A. 2R. 3P.

In the course of the proceedings in the Chancery Division, Romer J., to whose Court the action was attached, made an order dated March 14, 1898, directing the trial before a jury in the Queen's Bench Division of the following issue of fact, namely, "Whether the said piece of land comprising 8 acres 1 rood and 24 perches, and delineated and coloured pink on the map annexed to the said counter-claim, is common land or subject to any commonable rights either of the commoners of the parish of Cantref or of the commoners of the parish of Llanfrynach."

This issue accordingly came on for trial at the Glamorganshire Summer Assizes of 1898 before Phillimore J. and a special jury at Swansea.

At the trial certain questions arose as to the admissibility of evidence, and in particular as to two documents which were admitted by the learned judge in evidence on behalf of the commoners of Cantref and Llanfrynach. The first of these was a deposition of one Thomas Williams, who was examined on October 24, 1815, by virtue of a commission issuing out of the High Court of Chancery of the Great Sessions for the counties of Brecon, Glamorgan, and Radnor, to certain examiners therein named, directed for the examination of witnesses in a cause there depending between Charles Claude Clifton and Thynne Howe Gwynne. It was contended on one side but denied on the other that Thynne Howe Gwynne was a predecessor in title of the urban district council. An office copy of this deposition was produced from the Record Office, and it appeared that, although it was delivered to the examiners sealed up, it was now unsealed; but there was no evidence as to how it had become so. The second document was a "Report to the Officers of His Majesty's Land Revenue of the Manor of Penkelly Wallensis (otherwise Welch Penkelly)

in the county of Brecknock taken from a Survey made in 1816 by John Cheese of Lyonshall in the county of Hereford (Land Surveyor)." This report was made in pursuance of the 8th section of the "Act for the better management of the Land Revenue of the Crown, and for the sale of fee farm and other unimprovable rents" (34 Geo. 3, c. 75), upon the occasion of a sale of Crown lands; it was verified, as required by the Act, by the oath of Mr. John Cheese as the person employed to make the survey; and it was produced from the Land Revenue Office. At the time the said survey was made the Crown were owners of the said manor of Welch Penkelly, in which the defendants, the urban district council, admitted the piece of land in question to be situate.

Both the above documents were also tendered on behalf of the commoners as evidence of reputation; but the learned judge did not admit them on this ground. The learned judge also held, in favour of the defendants and upon the authority of *Earl Dunraven* v. *Llewellyn* (1), that evidence of reputation, oral or otherwise, was not admissible upon the trial of the issue. It did not appear that there were any copyholders of either of the manors of Cantref or Llanfrynach.

The jury found for the commoners of Llanfrynach—(1.) that the piece of land in question was in the parish of Llanfrynach and not in the parish of Cantref; and (2.) "that the said piece of land is common land, and subject to commonable rights of the commoners in the parish of Llanfrynach."

The defendants, the urban district council, who were the plaintiffs in the counter-claim, now moved to set aside this finding and for a new trial upon the grounds (inter alia)—(1.) that the verdict was perverse and against the weight of evidence; (2.) that the deposition of Thomas Williams was improperly admitted as evidence on behalf of the commoners, the defendants to the counter-claim; and (3.) that the survey and report of the manor of Welch Penkelly, made by Mr. John Cheese in 1816, was improperly admitted as evidence on behalf of the same defendants.

The motion came on before the Court on December 5, 1898,

(1) 15 Q. B. 791.

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and the questions as to the admissibility of the said documents in evidence were argued first.

B. F. Williams, Q.C., Upjohn, Q.C., and *R. Rowlands*, for the appellants, the defendants in the action, in support of the motion. The deposition of Williams, which is the foundation of the respondents' case, was not admissible as evidence upon the trial of this issue. Mr. Thynne Howe Gwynne, the defendant in the cause of *Clifton* v. *Gwynne*, on whose behalf the deposition was given, was not, as we contend, in any sense a predecessor in title of the district council. And there is no evidence that this deposition was ever used by the party to the suit on whose behalf it was made. Mere intention to use it at some time or other is not sufficient: *Richards* v. *Morgan*. (1) So that it cannot be treated as an admission by the party on the ground that he had used it and adopted its statements as his own. It is true that the depositions taken in the suit are now unsealed, but that does not shew that they have been used. The unsealing might have been for other purposes, such as the taking of office copies.

[LINDLEY M.R. referred to Daniell's Chancery Practice, 4th ed. p. 843. (2)]

Neither is it admissible as evidence of reputation. The matters in question in the suit were not matters of public interest, but were merely of private interest to particular persons in a particular locality; and a large number of private rights do not make a public right. It is an essential condition precedent to the reception of evidence of reputation that the evidence should come from a person who is shewn aliunde to have competent knowledge of the matters to which he deposed. And this condition is not fulfilled here. The deponent Williams trusted to his own knowledge, and his evidence was or may have been post litem motam.

Then as to the survey and report made by Cheese in 1816. That was not a public document. Though made on behalf of

(1) 4 B. & S. 641.

(2) See also 15 & 16 Vict. c. 86, s. 34; Braithwaite's Pr. 126.

the Crown, it was made for the Crown as a private owner. In *Phillips* v. *Hudson* (1), where a manor formerly belonged to the Crown, it was held that a grant and survey recorded in the Augmentation Office is not evidence for the tenants against the lord. In making this survey, Cheese had not to deal with boundaries at all, but with values only, and his report does not satisfy the tests applied by Lord Blackburn in *Sturla* v. *Freccia* (2), i.e., that in order to render evidence of this character admissible there must have been (1.) a public inquiry, (2.) a public document made by a public officer, and (3.) the document must be produced from the proper custody.

The report was admitted upon the authority of *Smith* v. *Earl Brownlow* (3); but that case is distinguishable from and has no application to the present.

If this land is common land at all—which we deny—it must be common appendant, and common appendant is not a common right of all tenants; but belongs to each grantee by virtue of his individual grant, and is incident thereto. The case is the same as if there were many persons tenants of a manor who claimed prescriptive rights over the lord's wastes, and reputation is not admissible in case of such separate rights: *Earl Dunraven* v. *Llewellyn*. (4)

Warmington, Q.C., and *S. T. Evans*, for the respondents, the plaintiffs in the action and the defendants to the counter-claim. The deposition of Williams was taken de bene esse in a suit to perpetuate testimony, and the case of *Richards* v. *Morgan* (5) is in our favour. It is said that this deposition was not actually used. It is submitted that user is not necessary: the witness's evidence was taken on behalf of a predecessor in title of the urban district council, who vouched him as having knowledge of the locality and matters in dispute. But there is the strongest presumption that it was used; the person on whose behalf it was taken had access to it, and the fact that although the examiners delivered it sealed up it was found unsealed is of itself evidence that it was used, or, at all events,

(1) L. R. 2 Ch. 243.
(2) 5 App. Cas. 623, 643.
(3) (1870) L. R. 9 Eq. 241.
(4) 19 L. J. (Q.B.) 388, 392; S. C. 15 Q. B. 791.
(5) 4 B. & S. 641.

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adopted by the person on whose behalf Williams was examined, and who, as we contend, was a predecessor in title of the district council: Taylor on Evidence, 8th ed. pl. 763, p. 669. Moreover, it is admissible as evidence of reputation: Taylor on Evidence, 8th ed. pl. 623, pp. 550, 551. Upon a question as to the boundary of a manor, which is a matter of public interest, evidence of reputation is admissible. And this is a question of public interest of a similar character. The wastes of manors are property in respect of which both the lords and the tenants of the manor and persons entitled to commonable rights have interests, and all are concerned to see that the boundaries are correct. This is a declaration made under the sanctity of an oath by a person who has special knowledge as to a matter with regard to which evidence of reputation is admissible; it comes from the records of the court now deposited in the Record Office, which is the proper custody, and it is admissible accordingly: *Warrick* v. *Queen's College, Oxford* (1); Taylor on Evidence, 8th ed., p. 539.

[VAUGHAN WILLIAMS L.J. You want to make this document speak for itself; you call no evidence aliunde that the person making the deposition had competent knowledge, and you do not shew that it is a document of a public character, or that it has been adopted by the person on whose behalf it was taken, or any of his successors in title.]

As to the survey, it is admissible upon the authority of *Smith* v. *Earl Brownlow*. (2) And, moreover, it was made in discharge of a duty imposed upon the person who made it by a public Act of Parliament, the statute 34 Geo. 3, c. 75, s. 8. It was not made on behalf of a private owner, but on behalf of the Crown, and it is a public document made by a public officer, and produced out of the proper custody, thus satisfying the tests applied by Lord Blackburn in *Sturla* v. *Freccia*. (3) Moreover, it is evidence against the defendants because the Crown were then the owners of the manors as predecessors in title of the vendor to the urban district council; and if necessary it was evidence of reputation. It contains evidence that this

(1) L. R. 6 Ch. 716. (2) L. R. 9 Eq. 241.
(3) 5 App. Cas. 623, 643.

is common land. It was properly admitted as evidence to go to the jury.

B. F. Williams, Q.C., in reply.

LINDLEY M.R. This is an application for a new trial upon which certain questions as to the admissibility of evidence have arisen, which we said we would consider before going on with the case upon the merits. We have now considered them, and, although there is one as to which we shall require some further assistance from the Bar, we wish to clear the way by stating our views upon two questions which we see our way to decide.

The case turned upon an issue which had been directed in the action, and was tried at Swansea. Under the Merthyr Tydfil District Council Waterworks Act, 1895, the defendants the council were empowered to take certain lands for the purpose of constructing a reservoir and waterworks, and they took amongst other lands the 8A. 1R. 24P. mentioned in the issue.

Their so doing of course extinguished all right of common or of any other character which there might be over the lands taken, and questions have arisen as to who was entitled to receive the money payable in respect of such commonable rights. An issue has been directed in a very peculiar form; and it has been framed, not for the purpose of ascertaining the persons to whom the money is to be paid, but in very general terms. Having regard to the very unusual frame of the issue in this case, which was rendered necessary or, at all events, desirable, in consequence of the terms of the Act of Parliament under which it was directed, I am of opinion that evidence of reputation is admissible on the question stated in the issue. The question left to the jury as stated in the issue is whether the piece of land therein described "is common land or subject to any commonable rights either of the commoners of the parish of Cantref or of the commoners of the parish of Llanfrynach." In other words, whether the piece of land in question is part of any common over which any one in either of those parishes has any right of common. This is

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a question of such general interest in the locality as to let in evidence of reputation. *Earl Dunraven* v. *Llewellyn* (1), which was relied upon by those who objected to the admissibility of this evidence, is no authority to the contrary, for the pleadings in that case shew that the issue there was simply whether a piece of land was the plaintiff's or the defendant's. The case of *Warrick* v. *Queen's College, Oxford* (2) shews that *Earl Dunraven* v. *Llewellyn* (1) does not go so far as is sometimes supposed.

The next point which arose was as to the deposition of Thomas Williams, taken on behalf of Mr. T. H. Gwynne in the suit to perpetuate testimony. The case of *Richards* v. *Morgan* (3) shews that this deposition would be admissible as an admission by Gwynne if it could be proved that it was ever used by him; but no evidence to this effect is forthcoming. There is no evidence that Gwynne ever adopted the deposition or made it his own in any way, and it cannot, therefore, be treated as an admission by him. A question, however, arises whether this deposition is not still admissible as evidence of reputation; and upon that point we shall desire further argument.

Objection has also been taken to the admission in evidence of the survey made by Mr. Cheese in 1816. Now with reference to that survey, I am of opinion that, having regard to the fact that it was made by Cheese in performance of the duty cast upon him by the statute 34 Geo. 3, c. 75, s. 8, this document was properly admissible. It is a survey of Crown lands on the occasion of a sale of them, and it was made pursuant to the provisions of a public Act of Parliament; it is a public document produced out of the proper custody, and is admissible as such. *Smith* v. *Earl Brownlow* (4) was a more difficult case, but a less authentic document was there admitted.

CHITTY L.J. The issue sent for trial at the assizes was settled by the parties, and was in a very peculiar form. It was this. [His Lordship then read the issue, and continued:—]

(1) 15 Q. B. 791.
(2) L. R. 6 Ch. 716.
(3) 4 B. & S. 641.
(4) L. R. 9 Eq. 241.

The defendants, the district council, had taken the land under their statutory powers for the purposes of a reservoir and waterworks. The 12th section of the Merthyr Tydfil District Council Waterworks Act, 1895 (58 & 59 Vict. c. clvi.), contained provisions limiting the quantity of the land which might be taken by the district council from "the commons or reputed commonable lands" thereinafter mentioned for the purposes of the reservoir and other works, and gave the names and descriptions of the commons thus: "Llanfrynach Common, Parish of Llanfrynach, Torglasse Common, ditto; Cantref Common, Parish of Cantref." And the following section (13) contains (I quote the words), "provisions for the protection and benefit of the commoners of the common lands in the parishes of Cantref and Llanfrynach (in this section called the commoners)."

The language of those sections throws some light upon the wording of the issue. The object of the issue was apparently to ascertain whether the piece of land taken by the district council was subject to any commonable rights of the commoners "of" either of the two named parishes. Commoners "of a parish" is a curious phrase, not easily intelligible from a lawyer's point of view. But I am not prepared to say that it might not be justified in the circumstances of the case. The Act and the issue imply that the commoners of the parishes have some commonable rights of some description over some land, and the inquiry was whether those commonable rights, whatever they were and whatever their nature might be, extended to the land taken. I agree with the Master of the Rolls that, having regard to the general interest in the locality on such a question, evidence of reputation was admissible, and that the decision of Lord Hatherley in *Warrick* v. *Queen's College, Oxford* (1), is in point.

As to the deposition of Thomas Williams made in the Chancery suit, I am of opinion that it was not admissible as an admission by conduct of a predecessor in title of the district council. Had there been evidence that it had been used by the party to the suit on whose behalf it had been made to prove a

(1) L. R. 6 Ch. 716.

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particular fact sought to be established by him, then *Richards* v. *Morgan* (1) would have applied, and it might have been admissible as an admission made by the party so using it; on the ground that by so using it, and by putting it forward as a true statement of the particular fact, he had adopted it as his own. But there is no evidence that the deposition was ever so used. The mere circumstance relied upon by Mr. Warmington, that the depositions returned by the examiners under seal are now found unsealed, is not evidence of user or adoption by the party on whose behalf the deponent Williams was examined. It was further contended that Williams' deposition was admissible as evidence of reputation; and upon that point we propose to hear some further argument.

As to the report of the surveyor Cheese, I think it was admissible on the ground that it was a document of a public nature. The survey and report were made pursuant to the public statute 34 Geo. 3, c. 75, s. 8, and were required as a necessary condition precedent to the sale of the Crown manor by the commissioners. The statute was one of general public interest: it put restrictions on the sale of Crown lands by the Crown or the commissioners acting on behalf of the Crown. I think that the document complies substantially with the tests stated by Lord Blackburn in *Sturla* v. *Freccia* (2), where he says that there should be a public inquiry, a public document, and that it should be made by a public officer.

The survey was made by Cheese in discharge of a public duty imposed by the statute, and was not made on behalf of the Crown as a private owner. The report was a public document made for the public purpose above indicated, and in discharge of the statutory duty; and Cheese, the surveyor, was appointed the public officer, and the document itself comes out of the proper custody.

The case is distinguishable from *Phillips* v. *Hudson* (3), where Lord Chelmsford L.C. seemed to consider, although he did not actually decide the point, that a survey coming from the Augmentation Office was inadmissible in evidence on the ground

(1) 4 B. & S. 641. (2) 5 App. Cas. 643.
(3) L. R. 2 Ch. 243.

that, although made on behalf of the Crown, it was just the same as if it had been made on behalf of a private owner. The survey there was not made, as here, under the requisitions of a public statute.

VAUGHAN WILLIAMS L.J. I have nothing to add except this, that it seems to me that when we come to consider the question of this evidence we must not leave out of sight the holding by the learned judge before whom the issue was tried that evidence of reputation was not admissible; because that is the holding which was applied, not only to the particular evidence of Williams, but also, on the objection of the plaintiffs, to evidence which was proposed to be adduced and which was excluded as being evidence of reputation. What I mean is, that this ruling of the learned judge was applied to both sides.

[The Court then directed that the case should be put again into the paper for further argument upon the question whether the above-mentioned and other depositions of the same character, considering their antiquity, the source from whence they came, and the persons by whom they purported to be made, were not admissible as evidence of reputation.]

Dec. 15, 16, 19. The case was again put into the paper, and argued upon the question whether the deposition of Williams and others of the same character were admissible as evidence of reputation, and whether the depositions themselves might be read in order to ascertain their admissibility as reputation, or, whether evidence aliunde must be given; but the Court, without deciding that question, came to the conclusion that as evidence of reputation was rejected by the learned judge at the instance of the urban district council, and as this ruling was applied to both sides, thus excluding what might be material evidence for both parties, the finding of the jury upon that issue ought not to stand and should be set aside, and the whole action should be remitted to Romer J. to direct what course should be taken in it. An order was accordingly made to that effect, and all questions of costs both in the Court of Appeal and below were left to the decision of Romer J.

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During the course of the second argument the following authorities were referred to:—

By *B. F. Williams, Q.C., Upjohn, Q.C.*, and *R. Rowlands*, for the appellants: *Davies* v. *Morgan* (1); *Crease* v. *Barrett* (2); *Freeman* v. *Phillipps* (3); *Berkeley Peerage Case* (4); *Reg.* v. *Bedfordshire* (5); *Duke of Newcastle* v. *The Hundred of Broxtowe* (6); *Reg.* v. *Bliss* (7); *Morewood* v. *Wood* (8); *Weeks* v. *Sparke* (9); *Taylor* v. *Devey*. (10)

By *Warmington, Q.C.*, and *S. T. Evans*, for the respondents: *Barraclough* v. *Johnson* (11); *Chapman* v. *Cowlan* (12); *Duke of Newcastle* v. *The Hundred of Broxtowe* (6); *Rowe* v. *Brenton* (13); *Thomas* v. *Jenkins* (14); *Talbot* v. *Lewis* (15); *Shedden* v. *Attorney-General*. (16)

Solicitors: *Carlisle, Unna, Ryder & Heaton; Sharpe, Parker, Pritchards & Barham.*

(1) (1831) 1 Cr. & J. 587.
(2) (1835) 1 C. M. & R. 919, 931.
(3) (1816) 4 M. & S. 486.
(4) (1811) 4 Camp. 401, 418, 421.
(5) (1855) 4 E. & B. 535, 542.
(6) (1832) 4 B. & Ad. 273.
(7) (1837) 7 Ad. & E. 550. (Per Williams J. 555.)
(8) (1792) 14 East, 327, n., 329, 330.
(9) (1813) 1 M. & S. 679, 686, 687, 689.
(10) (1837) 7 Ad. & E. 409, 414.
(11) (1838) 8 Ad. & E. 99, 101–3.
(12) (1810) 13 East, 10.
(13) (1828) Concanen's Rep. 319.
(14) (1837) 6 Ad. & E. 525.
(15) (1834) 1 C. M. & R. 495; S.C. 6 C. & P. 603.
(16) (1860) 30 L. J. (P. & M.) 217, 236.

W. W. K.

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[1896 L. 153.]

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1897
BYRNE J.
Nov. 16, 17, 18, 19.
1898
Feb. 3.
C. A.
Nov. 30; *Dec.* 1, 20.

Trade Union—Picketing—"Watching and besetting"—"Wrongfully and without legal authority"—Injunction—Criminal Law Amendment Act, 1871 (34 & 35 *Vict. c.* 32), *s.* 1—*Conspiracy, and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7.

Per Lindley M.R. and Chitty L.J.: To watch or beset a man's house, with the view to compel him to do or not to do that which it is lawful for him not to do or to do, is, unless some reasonable justification for it is consistent with the evidence, a wrongful act: (1.) because it is an offence within s. 7 of the Conspiracy, and Protection of Property Act, 1875; and (2.) because it is a nuisance at common law for which an action on the case would lie; for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset: *Bamford* v. *Turnley*, (1860) 3 B. & S. 62; *Broder* v. *Saillard*, (1876) 2 Ch. D. 692, 701; *Walter* v. *Selfe*, (1851) 4 De G. & Sm. 315; *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409.

Proof that the nuisance was caused by an attempt "peaceably to persuade other people" would afford no defence to such an action; though persons may be peaceably persuaded provided the method employed is not a nuisance.

In the expression at the beginning of s. 7 "with a view to compel," the word "view" does not import motive—it imports purpose.

Per Vaughan Williams L.J.: The words "wrongfully and without legal authority" in s. 7 of the Act of 1875 mean unwarranted by law.

According to the true meaning of s. 7 all watching and besetting is unlawful except such as is merely for the purpose of obtaining or communicating information; but the fact that a communication invites workmen to discontinue working as soon as they lawfully may does not take such communication out of the proviso in s. 7.

By the Court: Watching and besetting a person's house with a view to compel some one else is within s. 7, sub-s. 4, for the expression "such other" in the sub-section means "any other."

Sect. 7 of the Conspiracy, and Protection of Property Act, 1875, discussed and explained.

The decision of the Court of Appeal in *J. Lyons & Sons* v. *Wilkins*, [1896] 1 Ch. 811, approved, and held to be in no way overruled by *Allen* v. *Flood*, [1898] A. C. 1, or by any principle laid down therein.

Appeal from decision of Byrne J., holding the plaintiffs entitled to a perpetual injunction to restrain the defendants from watching or besetting either the plaintiffs' works or the works of a sub-manufacturer for them for any purpose except merely to obtain or communicate information, dismissed.

APPEAL from Byrne J.

This action was originally brought by J. Lyons & Sons, leather bag and portmanteau manufacturers, against P. C.

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Wilkins, the secretary, and C. Clarke, one of the executive committee, of a trades union called the Amalgamated Trade Society of Fancy Leather Workers. It arose out of a strike against the plaintiffs ordered by the society, in the course of which the plaintiffs' works, and also the works of Adolph Schoenthal, who was a sub-manufacturer for the plaintiffs, were picketed by persons employed by the executive committee, who (as it was found) watched and beset the works of the plaintiffs and of Schoenthal and the approaches thereto for the purpose of persuading workpeople to abstain from working for the plaintiffs. It was admitted that the pickets used no violence, intimidation, or threats; but in the opinion of the Court the evidence shewed that the picketing and the acts done by the pickets were done with the view to compel the plaintiffs to change their mode of conducting their own business, and constituted watching and besetting as distinguished from attending in order merely to obtain or communicate information.

On February 20, 1896, upon motion by the plaintiffs, North J. granted an interlocutory injunction, which, as modified in form by the Court of Appeal on March 19, 1896, restrained the defendants, their servants and agents, until trial of the action, from watching or besetting the plaintiffs' works or places for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, or for any purpose except merely to obtain or communicate information, and also from preventing Schoenthal or other persons from working for the plaintiffs by withdrawing his or their workmen from their employment respectively. The Court of Appeal also directed the costs of the appeal to abide the result of the action: see [1896] 1 Ch. 811, where the facts are fully reported.

The strike came to an end some time ago, and Messrs. A. Thompson, J. Laverick, and F. Goodhall, the trustees of the society, having been added as defendants, the action came on for trial before Byrne J. on November 16, 17, 18 and 19, 1897.

Eve, Q.C., and *Ward Coldridge*, for the plaintiffs.

Jenkins, Q.C., and *W. H. Cozens-Hardy*, for the defendants.

At the conclusion of the arguments, Byrne J. postponed his decision until after the House of Lords should have given

judgment in the case of *Allen* v. *Flood* (1), which was then proceeding before them. Judgment was delivered in *Allen* v. *Flood* (1) on December 14, 1897; and on February 3, 1898, Byrne J. delivered judgment in the present case.

Cur. adv. vult.

1898. Feb. 3. Byrne J. In this case the plaintiffs have obtained an injunction until judgment to restrain the defendants, their servants or agents, from watching or besetting the plaintiffs' works for the purpose of persuading, or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information; and also from preventing Adolph Schoenthal or other persons from working for the plaintiffs by withdrawing his or their workmen or workwomen from their employment respectively. By a slip, the order as drawn up has been made more extensive, but the terms I have mentioned are the true terms of the order pronounced by the Court of Appeal, as appears by the judgment of Kay L.J. (2)

In substance, at the trial the plaintiffs have clearly proved the case made upon the motion as to watching and besetting the plaintiffs' premises illegally, and in my judgment they are entitled to have the injunction made perpetual, so far as the first part of the injunction is concerned, for the reasons given by the Court of Appeal upon disposing of the motion; and I do not consider it necessary to add anything upon the law bearing on this part of the case. I consider that it is clearly proved that the defendants Wilkins, Clarke, and Thompson watched and beset the plaintiffs' works, or place of business, and the approaches thereto for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and for purposes other than that of merely obtaining or communicating information.

In reference to the second part of the injunction, I think the case made upon the motion is fully proved, and I think also that it has been clearly shewn that the same defendants illegally watched and beset the premises of Adolph Schoenthal

(1) [1898] A. C. 1. (2) [1896] 1 Ch. 811, 832.

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for the purpose of preventing him from working for the plaintiffs; but I think it probable that the Court of Appeal would have framed the second part of the injunction granted in a different manner had the case of *Allen* v. *Flood* (1) then been decided by the House of Lords. At any rate, the point has not been specifically argued whether or not, apart from the question of malice, it was unlawful to call out the workmen of Schoenthal in order to prevent him from working for the plaintiffs. Had the matter been one of importance in the present case, I should probably have required further argument; but the strike is long since over, and I have assumed that the parties would prefer not being put to the trouble and expense of a re-argument upon this point. I propose, therefore, to grant a perpetual injunction following the terms of the first part of the order of the Court of Appeal, but to frame the latter part of the injunction as follows: "and also from watching or besetting the premises of Adolph Schoenthal for the purpose of persuading or otherwise preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information." The injunction must extend to the defendant Thompson, who participated in the wrongful acts committed. The acts in question being unlawful, the other defendants, if they conspired to induce the commission of such acts, are equally liable to an injunction, and by their amended defence all the defendants make common cause and accept common responsibility in respect of the matters I have referred to, as well as in respect of the alleged libels, which still remain to be dealt with. And, indeed, it is difficult to see how, as officers of the society under an obligation to attend all meetings of the executive council, under whose directions the defendant Wilkins acted, and with power to express their opinion, they could well do otherwise, whatever the domestic constitution of the society they belong to may provide as to their voting powers.

The plaintiffs further ask for an injunction to restrain the defendants from maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs, and I

(1) [1898] A. C. 1.

postponed judgment at the request of the parties until after the decision of the House of Lords in *Allen* v. *Flood* (1) should be given. The effect of that decision, which has now been given, is, in my opinion, to shew that the plaintiffs are not entitled to this injunction. It was conceded by the plaintiffs that they could not succeed unless they could shew malice; and it is the law, as finally determined by the House of Lords, that the existence of a malicious motive cannot in such a case as this render unlawful an act or acts otherwise lawful. Another injunction was asked for by an amendment made by leave at the trial against the defendants, Thompson, Laverick, and Goodhall, as trustees of the society, from applying the funds of the society in furtherance of the wrongful acts complained of. I am of opinion that there is no legal ground to justify such an injunction, and I refuse it, and disallow the plaintiffs the costs of the amendment made in pursuance of such leave.

I now come to a part of the case which has not been dealt with upon motion, namely, the question whether or not the plaintiffs are entitled to an injunction or to damages in respect of certain alleged libels. These are contained in two letters. [His Lordship then dealt at length with the evidence on this point, and held that the letters were libellous, and continued:—]

Having regard to the facts, that the libels were not repeated, that they were contained in letters which did not remain long in the hands of the recipients, and that the recipients were not induced by them to leave their employment, I think that justice will be satisfied if I award 5*l.* damages in respect of the libels, which I accordingly do. The strike being long since over, I understand that the plaintiffs do not care actually to take an injunction. The defendants must pay the costs of the action except those I have mentioned, but they are entitled to be paid the costs of the motion to strike out the name of the society as defendants, and there must be the usual set-off.

H. L. F.

C. A.

The defendants appealed except on the finding as to the libel. The appeal came on for hearing on November 30, 1898.

(1) [1898] A. C. 1.

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W. H. Cozens-Hardy, for the appellants. Sub-s. 4 of s. 7 of the Conspiracy, and Protection of Property Act, 1875 (1), does not apply to the present case.

There was no physical violence or intimidation on the part of the defendants, and no obstruction of access to the plaintiffs' premises. All that is proved is that the defendants peacefully endeavoured to persuade workmen not to work for the plaintiffs. Such acts are not within sub-s. 4.

[*Eve, Q.C.*, for the plaintiffs. I admit that there was no physical violence, but very strong language was used by the defendants, and especially to women.]

The decision of the House of Lords in *Allen* v. *Flood* (2) shews that sub-s. 4 ought to be construed differently from the way in which this Court construed it on the hearing of the appeal against the interlocutory injunction granted by North J. in the present case: *J. Lyons & Sons* v. *Wilkins*. (3) In order to construe the section properly the prior statutes which dealt with the same subject must be considered. Before the Act of 1875, peaceful persuasion of workmen not to work for an employer was lawful, and that Act has not altered the law. The Act 6 Geo. 4, c. 129, s. 3, made it unlawful "by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another," to "force or endeavour to force" any workman to depart from his employment, or to prevent or endeavour to prevent any workman

(1) Sect. 7: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority," (inter alia)

"4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; . . . ."

"shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

"Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

(2) [1898] A. C. 1.

(3) [1896] 1 Ch. 811.

from hiring himself to, or from accepting work or employment from any person or persons. The thing forbidden was preventing by violence or by threats or intimidation. This Act was amended by 22 Vict. c. 34, s. 1, which provided that no workman should "by reason merely of his endeavouring peaceably, and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work" should be deemed or taken to be guilty of "molestation" or "obstruction" within the meaning of the prior Act. The cases decided upon those Acts shew that peaceful persuasion to abstain from work was not unlawful then: *Reg.* v. *Druitt* (1); *Reg.* v. *Shepherd.* (2) Then came the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32), which by s. 1 imposed a penalty on every person who (inter alia) should "molest or obstruct any person in manner defined by this section, with a view to coerce such person"—(inter alia) "being a workman to quit any employment . . . . or not to accept any employment or work;" and it provided that "a person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases" (inter alia)—"(3.) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more persons he follow such person in a disorderly manner in or through any street or road."

The prior Acts are repealed by this Act. By it every form of watching or besetting was forbidden, but it did not render merely peaceable persuasion unlawful. The second and final report, dated February 17, 1875 (Parliamentary Papers, 1875, vol. 30, Pt. I.), at p. 23, of the Royal Commission appointed to inquire into the working of the Labour Laws, stated the nature of the law then in force. (3)

(1) (1867) 10 Cox, C. C. 592.

(2) (1869) 11 Cox, C. C. 325.

(3) The following is an extract from the report, "the Act" referred to being the Criminal Law Amendment Act, 1871:—

"Again, it is alleged that too loose a construction has been put on this part of the Act, and that language addressed to a man for the purpose of persuading him has been held to be molestation with a view to coerce.

"If, however, such a construction, which would undoubtedly be too large,

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This was also stated in the charge of Mr. Russell Gurney, the then Recorder of London, to the grand jury in *Reg.* v. *Hibbert* (The Cabinet Makers' Case) (1), and in Baron Cleasby's

should have been put on the Act, the fault is not in the statute, the language of which is sufficiently clear and precise. The fault has lain with those who have administered it, and who, in some instances, in their desire to give full effect to a salutary law, may have been led to strain it too far."

(1) Parliamentary Papers, 1875, vol. 61, p. 223, reference No. 273.

The following is an extract from this charge:—

"Among the acts forbidden by that Act is this, the molesting or obstructing any person, by watching or besetting any place, or the approach to such place, where his business is carried on, with a view to coerce such person to alter his mode of carrying on his business.

"This then is the question that you will have to consider, whether the evidence that is laid before you is sufficient to establish a primâ facie case that the defendants did conspire to molest or obstruct the prosecutors, by watching or besetting their place of business, and whether they did this in order to coerce them to alter their mode of carrying on their business.

"And here you must observe that the question is, not whether they have endeavoured to take their stand by themselves refusing to work, and by persuading others not to work: this they have a right to do; but the question is whether they have tried to effect that object in a way that is forbidden by the Act, and with that purpose. That they did watch the place of business, probably, there is no doubt, but there are some purposes for which they had a perfect right to watch. When a contest of this sort is going on, it is not unusual, I believe, to watch, in order to see that none of the men who receive what is called 'strike pay,' are also receiving wages from the employer. But the more important object, no doubt, that the watchers had in view was, to inform all comers when, for instance, any might have been attracted to come there by the advertisements which had been inserted in the newspapers to inform them of the existence of the strike, and endeavour to persuade them to join them. All this is lawful so long as it is done peaceably, without anything being done to interfere with the perfect exercise of free will on the part of those who were otherwise willing to work on the terms proposed by the employer.

"The distinction to which I wish to draw your attention is well pointed out, as it appears to me, by Lush J., in a case in which a similar question arose, in which he says: 'To bring them within the terms of the Act under which the indictment is framed, there must have been threats or molestation otherwise than by endeavouring peaceably and in a reasonable manner to persuade others to abstain from work.' He refers to a previous case, that had been tried at Leeds, where there had been hooting at the men who were proposing to work, calling them names; in which case he had held that the parties pursuing that line were guilty of the offence of molestation and intimidation, in preventing by terror, the free exercise of the men's will; and he says at the end, 'The question that we have to decide is, whether the defendants did endeavour to control the free agency, or to overcome the free will of their fellow workmen, by force or intimida-

summing-up in the same case. (1) That charge has always been recognised as laying down accurately the law then in force on this subject, and it was referred to with approval by Lord Cairns as Lord Chancellor in the House of Lords. (2) Though all watching and besetting was at the time forbidden, the peaceful persuasion of workmen not to work for a particular employer was lawful.

Coming now to the Act of 1875, the circumstances under which that Act was passed may properly be referred to in order to construe it if its meaning is doubtful: see Cockburn C.J.

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tion. If there had been merely persuasion in the matter, whatever the consequences were, it would not be at all an unlawful act.'

"It seems to me, gentlemen, that, guided as one may fairly be by that decision of the learned judge, and by that exposition of the law, in which I perfectly agree, I should suggest to you that the sort of question you will have to ask yourselves is, whether the evidence shews that the defendants were guilty of obstructing and rendering difficult of access the prosecutor's place of business, or whether anything which they did was calculated to deter or intimidate those who were passing to and fro, or whether there was an exhibition of force, calculated to produce fear in the minds of ordinary men, or whether the defendants, or any of them, combined for that purpose, whether they combined in order to do it.

"If you think that, it seems to me, then it will be your duty to find a true bill; but if you think their conduct may be accounted for by a desire to ascertain who were the persons working there, or peaceably to persuade them or any others who were proposing to work there, to join their fellow workmen, who were contending, whether rightly or wrongly, to act for the interests of the general body, it seems to me that there is no evidence sufficient to establish the charge that is here made. That is the main question you will have to consider. Did they conspire together, first by the exhibition of force to obstruct the passage of persons to the place of business, and by that exhibition of force to deter them from taking a line contrary to that of the persons exhibiting that force, or whether they conspired by terror and intimidation to deprive the men of their free will to bestow their labour just where they thought fit. If they did that, it seems to me that they have laid themselves open to a criminal charge. But if, on the contrary, they were only there peaceably to warn persons that there was a strike, and peaceably to tell them that it would be to their interest to join their strike, and not to adopt a system which, whether rightly or wrongly, was what they considered otherwise than advantageous to their own interests, if they merely did that, I cannot see any ground upon which this criminal charge exists."

(1) (1875) 13 Cox, C. C. 82.

(2) See Hansard, 3rd series, vol. 226, pp. 37, 38.

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in *South Eastern Ry. Co.* v. *Railway Commissioners* (1), Lord Hatherley L.C. in *Hebbert* v. *Purchas* (2), and Baggallay L.J. in *Reg.* v. *Bishop of Oxford.* (3) So may the speeches of members of the Government, including Lord Cairns L.C. in introducing the Bill, and the Journals of the House of Lords and House of Commons; and I desire to refer to them from Hansard. (4)

[Lindley M.R. We cannot allow them to be referred to as a guide to the true construction of the Act, whatever their historical interest may be.]

The Act of 1875 was not intended to increase the stringency of the law or to create new offences: *Connor* v. *Kent.* (5)

The Act of 1875 was aimed at the prevention of personal violence. To constitute an offence against that Act the watching and besetting must be done (1.) "with a view to compel," and (2.) wrongfully. As to (1.), it must be to compel another person to abstain from doing or to do some particular act which such other person has a legal right to do or to abstain from doing: *Reg.* v. *McKenzie.* (6) There is here no evidence either of compulsion, or of compulsion directed to any particular end. The workmen were only persuaded not to work, and it is suggested that the employers were "compelled." It is essential that the act should be done with a view or intent to compel. What is the meaning of "compel"? There must be some element of physical violence, constraint, intimidation, or terrorism. There is a great distinction between compelling and inducing a man to adopt a particular line of conduct. Unless it can be shewn that the plaintiffs were placed in such a position that any reasonable man would have no alternative except to do against his will what the workmen wanted, there was no compulsion. An employer might yield voluntarily on knowing the real facts of the case. But in fact the plaintiffs did not yield to the demands made upon them, which shews that there was no compulsion.

(2.) Then the act must be done "wrongfully." That must

(1) (1880) 5 Q. B. D. 217, 236.
(2) (1871) L. R. 3 P. C. 605.
(3) (1879) 4 Q. B. D. 525, 576.
(4) See Hansard, 3rd series, vol. 225, p. 1579; vol. 226, pp. 37, 38, 166, 711, 715.
(5) [1891] 2 Q. B. 545, 550–1.
(6) [1892] 2 Q. B. 519.

mean that the act is an infringement of some legal right of the plaintiffs. No legal right of the plaintiffs was infringed by what the defendants did. No legal right of an employer is infringed if some workmen are peaceably persuaded not to work for him. Annoyance short of a legal nuisance is not a wrong, and there is no proof or even suggestion of any nuisance to the plaintiffs. There was no molestation. *Allen* v. *Flood* (1) shews that mere annoyance without infringement of some legal right is not an offence, whatever the motive may be. Watching and besetting should be held to have the same meaning as in the earlier Act: *Mersey Docks and Harbour Board* v. *Cameron* (2), and not to prohibit peaceful persuasion. Any other construction would involve an absurdity. The proviso at the end of s. 7 is put in ex majori cautelâ, and is not an instance of the principle expressio unius exclusio est alterius.

Assuming, however, that the Court is against me as to the watching and besetting of the respondents' premises, the respondents cannot under the Act of 1875 obtain any injunction as to the watching and besetting of Schoenthal's premises. To watch Schoenthal's premises with the view to compel Lyons & Son is not an offence within s. 7. Schoenthal must be a co-plaintiff if any right of his has been interfered with, for the only person who can complain is the person who is compelled by the watching and besetting of his own premises.

Eve, Q.C., and *Ward Coldridge*, for the respondents. The whole matter was concluded by the judgment delivered by this Court on the interlocutory application. The watching and besetting to which our premises and those of Schoenthal were subjected were both wrongful and without legal authority (as involving trespasses and libels), and with a view to compel within the meaning of s. 7 of the Act of 1875. It was the oppressive combination which injured us. Sect. 7 of the Act of 1875 is a section imposing penalties on persons who infringe it; and the words "wrongfully and without legal authority" in that section, though they must be inserted in an indictment founded on the action, add nothing to the enactment. In the same way the word "feloniously" adds no force, although the

(1) [1898] A. C. 1. (2) (1865) 11 H. L. C. 443, 480.

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omission of it in an indictment for stealing would be fatal to the indictment.

The words "such other person" in sub-s. 4 mean "any other person whatever." The decision in *Allen* v. *Flood* (1) does not in any way affect this case.

W. H. Cozens-Hardy, in reply, referred to *Mogul Steamship Co.* v. *McGregor.* (2)

Cur. adv. vult.

Dec. 20. LINDLEY M.R. The construction put by this Court on 38 & 39 Vict. c. 86, ss. 3, 7, when this case was heard in March, 1896 (3), is adverse to the appellants, and was, in my judgment, correct. Having reconsidered my own judgment, I see nothing to recall or qualify. Upon the present appeal, however, one or two important questions were raised which do not appear to have been considered on the former occasion, and to them I will confine myself. The great point made by the appellants' counsel turned on the word "wrongfully" in s. 7 and on the effect of *Allen* v. *Flood* (1) on the meaning of that word. He contended that to "watch or beset" another person's house was only illegal if done—(1.) with a view to compel him to abstain from doing or to do some act which he has a right to do or not to do; (2.) wrongfully and without legal authority. He further contended that nothing could be said to be wrongful which did not violate some right of the complainant; and that there was nothing wrongful in watching or besetting a house simply in order peacefully to persuade others to conduct themselves in some particular way which was not unlawful for them to follow. This argument is, in my opinion, based on a misconstruction of s. 7. This section is a penal section, and the words "wrongfully and without legal authority" must be inserted in an indictment or information framed on the enactment, and the specific acts which the complainant was to be compelled to do or not to do ought also to be specified in a conviction by a magistrate: see *Reg.* v. *McKenzie.* (4) Moreover, if on the

(1) [1898] A. C. 1.
(2) (1889) 23 Q. B. D. 598.
(3) [1896] 1 Ch. 811.
(4) [1892] 2 Q. B. 519.

trial the evidence before the Court is consistent with the legality of the acts complained of, this reasonably possible legality must be excluded by evidence before the accused can be properly convicted. But it is not necessary to shew the illegality of the overt acts complained of by other evidence than that which proves the acts themselves, if no justification or excuse for them is reasonably consistent with the facts proved. This is the principle always applied in criminal prosecutions in which the words "feloniously," "wrongfully," or "maliciously" are introduced into the charge, and have to be proved before the person accused can be properly convicted: see Archbold's Criminal Pleadings and Evidence, 19th ed. pp. 64–7. That this is the correct method of construing and dealing with the words "wrongfully and without lawful authority" in s. 7 is, in my opinion, perfectly plain if attention is paid to sub-heads 1, 2, 3, and 5, to which those words are as applicable as they are to sub-head 4. If the overt acts mentioned in sub-head 1, for example, i.e., using violence or intimidation, are proved, and it is proved that they were done with a view to compel, &c., and there is no reasonable ground for justifying them, it is unnecessary to give further evidence to prove that they were committed "wrongfully and without legal authority": see *Reg.* v. *McKenzie*. (1) If this be true of all the sub-heads except 4 (watching and besetting), I can discover no justification for giving the words "wrongfully and without lawful authority" any different meaning or effect when applied to 4—namely, "watching or besetting."

The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law: see *Bamford* v. *Turnley* (2), *Broder* v. *Saillard* (3), per Jessel M.R., *Walter* v. *Selfe* (4),

(1) [1892] 2 Q. B. 519, 521–3.
(2) 3 B. & S. 62.
(3) 2 Ch. D. 692, 701.
(4) 4 De G. & Sm. 315.

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and *Crump* v. *Lambert*. (1) Proof that the nuisance was "peaceably to persuade other people" would afford no defence to such an action. Persons may be peaceably persuaded provided the method employed to persuade is not a nuisance to other people.

Another point made by the appellants' counsel was that what was done to Schoenthal gave the plaintiffs no cause of action. This point was raised and considered and decided by the Court on the former appeal, and I might say no more. But as I do not remember whether the particular argument urged by Mr. W. H. Cozens-Hardy was used on that occasion, I will add that, in my opinion, his contention cannot be supported. It is based on the expression "such other person." It is said that to beset one person's house with a view to compel some one else is not within the section. Such a construction would render the Act nugatory in a great number of cases clearly within the mischief intended to be remedied. But a more direct answer to the argument is that "such other" means "any other." This seems plain if attention is paid to the language of the first part of the section where these words first occur. Moreover, the word "person" in the singular must be read so as to include "persons" in the plural (see 52 & 53 Vict. c. 63, s. 1), and if this is borne in mind the argument is seen at once to be untenable.

I do not think it necessary to refer to the older Acts to which Mr. W. H. Cozens-Hardy called our attention, nor to the authorities he cited. They are instructive; and the late Mr. Russell Gurney's charge to the grand jury in the *Cabinet Makers' Case* (2) is a masterly statement of the law as it stood in April, 1875. But there is nothing in these authorities or in that charge which shews that the interpretation put upon the present Act by this Court in this case on the former appeal, and by Byrne J. since, is wrong. Nor is *Allen* v. *Flood* (3) of any real use in construing the statute with which we have to deal.

As regards the facts, the evidence was amply sufficient to prove the plaintiffs' case. The whole object of what was done

(1) L. R. 3 Eq. 409. (2) 13 Cox, C. C. 82.
(3) [1898] A. C. 1.

was to compel the plaintiffs to comply with the terms contained in a circular put forth by Mr. Wilkins, and although there was no violence or overt threat of violence, it is quite plain that the relays of men set to watch and beset the plaintiffs' house (and the house of Schoenthal, who worked for him) were sent to do, and that they did, a great deal more than "attend" where they were "in order merely to obtain or communicate information."

It is all very well to talk about peaceable persuasion and to draw fine lines between persuading and giving information. The line may be fine, but in this case there is no difficulty whatever in coming to the conclusion that what was done was watching and besetting as distinguished from attending "in order merely to obtain or communicate information." That the provisions of the Act were infringed appears to me to be plain and beyond all reasonable doubt. The appeal must be dismissed with costs.

Chitty L.J. This appeal by the defendants is limited to the injunction granted by Byrne J. against watching and besetting. The injunction is in the terms of the order pronounced by the Court of Appeal on the motion. He postponed giving judgment until after the decision of the House of Lords in *Allen* v. *Flood* (1), and after consideration he held that *Allen* v. *Flood* (1) did not affect the decision of the Court of Appeal on the motion, but that it did preclude him from granting a further injunction which the plaintiffs asked for. There is no appeal by the plaintiffs. The facts proved at the trial were to the same effect as those given in evidence on the motion, except that in two instances Byrne J. held that the evidence of actual interference was not so strong. He found that it was clearly proved that the appellants watched and beset the plaintiffs' works or place of business and the approaches thereto for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and for purposes other than that of merely obtaining or communicating information. This finding of facts is accepted by counsel on

(1) [1898] A. C. 1.

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both sides. It was admitted by the plaintiffs' counsel that the pickets (as they are called) used no violence or intimidation or threats. The picketing extended over some months, covered all the working hours of the day, and was conducted by relays of men in succession. The object in view was clearly shewn by the white cards distributed by the pickets and the other documents referred to. The picketing and the acts done by the pickets were done with a view to compel the plaintiffs to abstain from doing or to do acts which the plaintiffs had a legal right to do or abstain from doing—namely, to compel them to change the mode of conducting their own business. To avoid any possible misapprehension, I state that the strike itself was lawful.

The question on the appeal in my opinion turns on the 7th section of the Conspiracy, and Protection of Property Act, 1875. The construction and effect of that section were dealt with by this Court on the motion, and the decision then arrived at is binding on us, subject only to the point whether it can be shewn to be erroneous as being in conflict with *Allen* v. *Flood*. (1) I am unable to see that it is. The point decided in *Allen* v. *Flood* (1) is that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. No such general question of motive arises in the present case. The sole question is whether upon the facts the case is brought within the 7th section. To bring a case of watching or besetting within the section it must be shewn that the watching or besetting was done with a view to compel a person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing. That the watching and besetting were done with that view is found by the judge and not disputed. "View" does not import motive. It imports purpose. Speaking for myself, I prefer standing by the words which the Legislature has thought fit to employ. The acts complained of were done with the view stated in the section.

Then it was urged that the watching and besetting mentioned in the 4th sub-section was not rendered unlawful by that sub-

(1) [1898] A. C. 1.

section where it was done for the purpose of persuading workmen to abstain from taking work from the person sought to be compelled. I cannot accept that proposition. I think that where the view is established the only case in which watching or besetting is allowed, or, in other words, is not unlawful, is that mentioned in the proviso at the end of the section—namely, where the attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place is "in order merely to obtain or communicate information." Attending in order to persuade is not within the proviso. It is noticeable that the 1st section of the Act of 1871, which Act is repealed by the Act of 1875, contained no such proviso, and that the 7th section is more favourable to those who watched or beset.

Mr. W. H. Cozens-Hardy, in his argument for the appellants, fastened on the words "wrongfully and without legal authority," and contended that they shewed that the watching or besetting mentioned in the 4th sub-section were acts lawful in themselves, unless it were shewn in some way other than by proof of the facts of watching or besetting with the view mentioned at the beginning of the section that the acts done were done wrongfully or without legal authority. But this argument cannot be sustained. "Wrongfully and without legal authority" applies equally to all the five sub-sections; and to take (by way of illustration) the 1st sub-section, the using of violence, or intimidation, or injury to property, there specified, are all of them unlawful acts in themselves. No just or sound construction of the section would permit words which in terms apply to all the sub-sections being confined to one sub-section only.

But further, the acts of watching or besetting here proved in reference to the 4th sub-section, and done with the view mentioned, were acts in themselves unlawful at common law, and are not made lawful by the Legislature. In my opinion they constitute a nuisance at common law. True it is that every annoyance is not a nuisance; the annoyance must be of a serious character, and of such a degree as to interfere with the ordinary comforts of life. To watch or beset a man's house for

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the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance of an aggravated character. It must be borne in mind that the 7th section, although it probably arose out of trade disputes, is not confined to trade disputes or to disputes between masters and men. It applies equally to all Her Majesty's subjects of every class. It would embrace the case of besetting a man's house with a view to compel him not to receive guests or visitors.

Further, I think that the whole argument on the words "wrongfully and without legal authority" is founded upon a misapprehension. The acts mentioned in the five sub-sections being in themselves unlawful, the words "wrongfully and without legal authority" are inserted to provide for any unforeseen case in which the evidence of the overt acts may possibly shew some lawful excuse or justification; or, to speak perhaps more correctly (as "authority" is said to cover "excuse": see *Reg.* v. *Harvey*) (1), lawful authority or justification. The term "wrongfully" and its meaning in law were dealt with incidentally by many of the Lords who advised the House in *Allen* v. *Flood.* (2) It will suffice to quote one passage to be found in Lord Herschell's speech (3), where he cites with approval the statement by Crompton J. in his judgment in *Lumley* v. *Gye* (4), that it must now be considered clear law that a person who "wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant . . . . commits a wrongful act for which he is responsible at law."

With regard to Schoenthal, it was decided on the motion that the watching and besetting of his house or shop with a view to compel the plaintiffs were illegal acts on the part of the defendants for which the plaintiffs could sustain an action against them. On this appeal Mr. W. H. Cozens-Hardy raised what may have been a new point founded on the words "such other person" which run throughout the 7th section. It was urged that besetting the house of one person with a view to compel another is not within the section. I think it is. Gram-

(1) (1871) L. R. 1 C. C. 284.
(2) [1898] A. C. 1.
(3) [1898] A. C. 121.
(4) (1853) 2 E. & B. 216, 224.

matically, "such other" refers to "any other person," the immediate antecedent. Besetting a workman to compel a master and besetting a master to compel a workman are both within the mischief aimed at. Schoenthal was an outworker for the plaintiffs. The result, in my opinion, is that the appellants have failed to shew that the decision of the Court on the motion is in any way overruled by *Allen* v. *Flood* (1), or by any principle laid down in that case.

Vaughan Williams L.J. I concur because I think this case concluded by the judgment of this Court on the interlocutory application to this court in this case. I agree that the case of *Allen* v. *Flood* (1) in the House of Lords has no application to the case before us.

I wish, however, to say a word or two on the construction of s. 7 of the Act of 1875, upon which the judgment of this Court turned. The section runs thus: [His Lordship then read the section, and continued:—]

Now, I think these words "wrongfully and without legal authority" mean unwarranted by law, which in an indictment for a nuisance is ordinarily expressed by the word "injuriously." The late Mr. Justice Stephen thus defines a common nuisance (2): "A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." This is a different thing from holding the words "wrongfully and without legal authority" to mean without lawful excuse, which would shift the onus from the prosecution to the defence.

At the common law watching and besetting, apart from the law of conspiracy, might or might not be so conducted as to amount to a nuisance. Then came the Act of 1875, which, in my opinion, is intended to define what kind of watching and besetting shall in future be warranted by law; and the definition, in my opinion, means that watching and besetting shall in

(1) [1898] A. C. 1. (2) Stephen's Dig. of Crim. Law, 5th ed. p. 140.

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future be confined to "watching and besetting merely for the purpose of obtaining or communicating information."

I think that the fact that the communication invites the men to discontinue working for the master as soon as they lawfully may does not thereby cause the communication to cease to be a communication within the meaning of the proviso.

If the persuading takes any other shape than that of a communication within the meaning of the proviso contained in s. 7, this would, in my opinion, make it unwarranted by this section, even though this persuasion might not otherwise be of such a character as to constitute a nuisance at common law. And, even if the persuasion does take the shape of such a communication, yet it may be made in such a manner as to constitute a common law nuisance, and thus be wrongful.

It is not, as I understand, suggested in this case, or found by Byrne J., that there are any facts in the present case to constitute the present persuasion a common law nuisance.

I agree that "such other person" in sub-s. 4 includes masters sought to be compelled, and not only the servant to whom the communication or persuasion is addressed. You must find the meaning of "such other person" by looking at the first part of s. 7.

These are my views; but I am, as I have already said, bound by the previous decision of this Court.

Solicitors: *Shaen, Roscoe, Massey & Co.; Warburton & De Paula.*

W. W. K.

In re MUNDY AND ROPER'S CONTRACT.

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1898
KEKEWICH J.
May 13, 14.
C. A.
Nov. 8, 10; *Dec.* 20.

[1898 M. 1006.]

Settlement — Settled Land — Creation of Jointure and Portions Charges— Resettlement—Limitation of new Life Estate without in Terms restoring former Life Estate—Compound Settlement—Title—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 20, *sub-ss.* 1, 2; *s.* 50; *s.* 58, *sub-s.* 1 (*iv.*).

By deed dated in 1861, lands were settled to the use of A. for life with remainder to his first and other sons successively in tail male. In exercise of a power reserved to him by this deed, A., upon his marriage in 1865, by deed charged the lands with a jointure rent-charge for his wife, and with portions for his younger children, both charges being secured by terms of years in the usual way. In 1889, in order to carry out a family arrangement, A. and B. (his eldest son) by deed No. 1 disentailed the lands, and by deed No. 2, in exercise of a power contained in deed No. 1, appointed them to the use of A. for life, with remainders over, without, however, in terms expressing that this life estate was limited to A. in restoration or continuation of his former life estate:—

Held, that deed No. 2 of 1889 should not under the circumstances be treated as the only settlement of the property, but should be treated as constituting, together with the previous deeds of 1861, 1865, and 1889, a "settlement" within the meaning of the Settled Land Act, 1882, ss. 2 and 20; and *held* accordingly that it was competent for A. to sell and make a good title to the lands discharged from the jointure and portions, upon trustees of the settlement being appointed to receive the purchase-money.

The words in sub-s. 1 of s. 2 of the Act of 1882, "stands for the time being limited to or in trust for any persons by way of succession," have no technical force, and, according to their natural meaning, include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life and the terms of years limited to trustees to secure them.

There may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one only of the deeds. The decision of Stirling J. on this point in *In re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, approved.

The effect of s. 50 of the Act of 1882 is that the statutory power of sale given to a tenant for life by the Act of 1882 is not annexed to his estate as in ordinary conveyancing, but is vested in him once for all by the Act, is incapable of being assigned or released, and continues exercisable by him notwithstanding assignment by him of his estate; so that, although the life estate of A. must be treated as a new life estate arising under

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the resettlement, the statutory power of sale vested in A. before the resettlement was not affected by it.

Per Vaughan Williams L.J.: Where an estate in fee simple is settled in the ordinary way with the usual limitations and powers, it is doubtful whether the terms to secure jointure or portions, or the interests thereby secured, are limitations by way of succession within the meaning of s. 2 of the Settled Land Act of 1882, for such terms are mere charges overriding the successive limitations which exhaust the fee and come into operation contemporaneously with them.

The decision of Kekewich J. reversed.

The decision of Stirling J. in *In re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345, approved.

APPEAL from decision of Kekewich J. upon an adjourned summons under the Vendor and Purchaser Act, 1874.

By a deed of resettlement dated March 15, 1861, an estate known as the Ormsby estate was, in exercise of a power contained in a disentailing deed, appointed and conveyed to the use of Charles John Henry Mundy during his life, with remainder to the use that in case Elizabeth Susan Mundy should survive Charles John Henry Mundy and Mary Jane Massingberd (which in fact happened), she should, after the decease of the survivor of them, receive the yearly rent-charge of 800*l.* by way of jointure, and subject thereto to the use of trustees for the term of 500 years for securing payment of the rent-charge, with remainder to the use of a trustee for the term of 1000 years from the decease of the said Charles John Henry Mundy, and subject thereto, in the events which happened, to the use of Charles Francis Massingberd Mundy (then Charles Francis Mundy) for life, with remainder to the use of his first and other sons successively according to seniority and the heirs male of their respective bodies, with divers remainders over; and it was thereby declared that the term of 1000 years was so limited to raise for the portions of the younger children of the said Charles John Henry Mundy by the said Elizabeth Susan Mundy the sum of 8000*l.* in such shares as the said Charles John Henry Mundy should by deed or will appoint, and in default of appointment for such children equally and to be vested on twenty-one or marriage; and the resettlement contained a power for Charles Francis Massingberd Mundy to

appoint to any woman whom he might marry a yearly rent-charge of 500*l.*, and to appoint the estate so charged for any term of years upon usual trusts for securing such jointure, and to charge the estate with the payment of a sum not exceeding 8000*l.* as portions for his younger children, and to appoint the estate to any person for any term upon usual trusts for raising such portions.

Mary Jane Massingberd died February 21, 1863.

On May 8, 1863, Charles John Henry Mundy by royal licence assumed the name of Massingberd in addition to, and before that of, Mundy.

By the settlement made on the marriage of Charles Francis Massingberd Mundy and dated August 7, 1865, Charles Francis Massingberd Mundy, in exercise of the power reserved to him by the resettlement of March 15, 1861, appointed an annual rent-charge of 500*l.* to his wife Louisa Charlotte Massingberd Mundy in case she should survive him, to be charged upon and issuing out of the Ormsby estate, and thereby appointed the estate to the use of trustees for the term of 300 years from the death of Charles Francis Massingberd Mundy upon usual trusts for securing payment of such rent-charge; and in further exercise of the powers reserved to him by the resettlement he charged the Ormsby estate with the payment of the sum of 8000*l.* as portions for the younger children of the marriage, to be vested and payable in such manner as he should by deed, will, or codicil appoint, and appointed the estate to the use of trustees for a term of 1500 years to raise and levy such portions.

Charles John Henry Massingberd Mundy died on February 19, 1882.

By an indenture dated January 29, 1889, made between Charles Drayner Massingberd Mundy, the eldest son of Charles Francis Massingberd Mundy, of the first part, Charles Francis Massingberd Mundy of the second part, and trustees of the third part, duly perfected as a disentailing assurance, the Ormsby estate was assured by Charles Drayner Massingberd Mundy with the consent of Charles Francis Massingberd Mundy, and by Charles Francis Massingberd Mundy unto the

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trustees, subject to the incumbrances affecting the same, and the estate and charges prior to and the powers overreaching the estate tail of Charles Drayner Massingberd Mundy, but discharged from the estate tail of Charles Drayner Massingberd Mundy, and all estates to take effect after the determination thereof to such uses as Charles Francis Massingberd Mundy and Charles Drayner Massingberd Mundy should jointly appoint.

By an indenture dated January 30, 1889, and made between Charles Francis Massingberd Mundy and Charles Drayner Massingberd Mundy of the first part, Charles Francis Massingberd Mundy of the second part, Charles Francis Massingberd Mundy and Charles Drayner Massingberd Mundy of the third part, Elizabeth Susan Massingberd Mundy, the widow of Charles John Henry Massingberd Mundy, of the fourth part, Millicent Harriet Massingberd Mundy, one of the four younger children of Charles John Henry Massingberd Mundy, of the fifth part, Sophy Jane Massingberd Mundy, another of such younger children, of the sixth part, Charles Francis Massingberd Mundy, in his capacity of legal personal representative of the two remaining younger children, then both deceased, of Charles John Henry Massingberd Mundy, of the seventh part, Louisa Charlotte Massingberd Mundy, wife of Charles Francis Massingberd Mundy, of the eighth part, and the Rev. William Oswald Massingberd and George Montagu Jull of the ninth part, Charles Francis Massingberd Mundy and Charles Drayner Massingberd Mundy, in exercise of the power reserved to them by the disentailing assurance, appointed that the Ormsby estate should stand limited to the uses thereinafter declared, namely, that it should be lawful for Charles Francis Massingberd Mundy, subject only to certain mortgages of 16,000*l.* and 10,000*l.*, and to the uses then subsisting and not thereinafter released or postponed, to charge the Ormsby estate with payment to himself or any other person of the sum of 5000*l.* with interest, and with power to appoint a term of years for securing such sum, and Elizabeth Susan Massingberd Mundy and Louisa Charlotte Massingberd Mundy thereby postponed their respective rent-charges of 800*l.* and 500*l.* to any person claiming under such mortgage, and each of them, the said Charles

Francis Massingberd Mundy (as legal personal representative of the two younger children, then deceased, of Charles John Henry Massingberd Mundy), and Millicent Harriet Massingberd Mundy and Sophy Jane Massingberd Mundy as the remaining two younger children, released the Ormsby estate from the sum of 8000*l.* and interest, portions charged thereon which they were entitled to, to the intent that the term of 1000 years might determine and become a satisfied term, and by the same indenture the beneficial interest of all persons claiming as next of kin under or by virtue of any testamentary or other disposition of any of the next of kin of the two deceased younger children in the sum of 8000*l.* was released and discharged, and it was thereby declared that the Ormsby estate should, subject to the subsisting mortgages of 16,000*l.* and 10,000*l.*, so far as they affected the same, but freed and discharged from the sum of 8000*l.* and interest, portions of the younger children of Charles John Henry Massingberd Mundy, and the term of 1000 years to secure the same, stand limited to the uses following—that is to say: (1.) To the use that Millicent Harriet Massingberd Mundy and Sophy Jane Massingberd Mundy should during their joint lives and the life of the survivor of them receive a yearly rent-charge of 600*l.* per annum charged upon the Ormsby estate. (2.) To the use that Charles Drayner Massingberd Mundy should receive a yearly rent-charge of 150*l.* to be increased to 200*l.* in events which happened with a substitutionary rent-charge of 200*l.* to his widow in the event of his death in the lifetime of his father Charles Francis Massingberd Mundy. (3.) To the use of Charles Francis Massingberd Mundy during his life. (4.) To the use of Charles Drayner Massingberd Mundy during his life. (5.) To the use of the first and every other son of Charles Drayner Massingberd Mundy successively in tail with divers remainders over.

Elizabeth Susan Massingberd Mundy died on January 1, 1892.

By a deed-poll dated July 16, 1897, Charles Francis Massingberd Mundy, in exercise of the power reserved to him by the settlement of August 7, 1865, appointed the sum of 8000*l.* to his four younger children.

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On August 6, 1897, Charles Francis Massingberd Mundy entered into a contract with the respondents F. L. Roper, A. G. Fletcher, and J. S. Sills for the sale to them of about 141 acres, part of the Ormsby estate, for the sum of 7100*l.*

On the investigation of the title the objection was taken by the purchasers that as the resettlement of 1889 did not appear to have kept alive the former life estate of the vendor under the settlement of 1861, he could not override the jointure and portions charged by his marriage settlement in 1865, but the concurrence of Mrs. Mundy and the younger children would be required.

The objection being insisted on, the present summons was taken out by the vendor asking for the appointment of new trustees of the following instruments, namely, the resettlement dated March 15, 1861, the settlement dated August 7, 1865, the disentailing assurance of January 29, 1889, and the resettlement dated January 30, 1889; and a declaration that Millicent Harriet Massingberd Mundy, and Sophy Jane Massingberd Mundy, Louisa Charlotte Massingberd Mundy, and Philippa Alice Massingberd Mundy, Godfrey Bertram Massingberd Mundy, Oswald Francis Massingberd Mundy, and Henry Louis Massingberd Mundy, jointress and portionists respectively under the settlement, were respectively bound by the contract, and that the applicant, having power to convey the estate free from the terms whereby the jointure and portions were respectively secured and discharged from the charge of such jointure and portion and rent-charge in lieu of portions, the purchasers were not entitled to require the concurrence in the conveyance of the said jointress and portionists, or of the trustees of the said respective terms.

The summons came on for hearing before Kekewich J. on May 13, 1898.

Martelli, for the vendor, the tenant for life, in support of the summons. I submit that the case is governed by the decision of Stirling J. in *In re Marquis of Ailesbury and Lord Iveagh*. (1) The deed of January 30, 1889, was a resettlement, and

(1) [1893] 2 Ch. 345.

according to the principle of the decision referred to, that deed, together with the previous settlements of March 15, 1861, and August 7, 1865, and the disentailing deed of January 29, 1889, constituted one "compound" settlement. At the time of the settlement taking effect, within the meaning of s. 2, sub-s. 4, of the Settled Land Act, 1882, the limitations of the settled land comprised the jointure rent-charge of 500*l.* to Mrs. Mundy and the charge of 8000*l.* portions for younger children, and therefore, under s. 20 of the Act, the vendor can convey the land discharged from those limitations, and make a good title to the purchasers, upon trustees of the compound settlement being appointed by the Court under the Act to receive the purchase-money.

W. A. Peck, for the purchasers.

KEKEWICH J. It is desirable in the interest, not merely of the legal profession, but of those who wish to sell or purchase land, that the exact limit of the modern term "compound settlement" should be defined by the Court of Appeal. The cases which have occurred during the last few years appear, so far as my study of them goes, not entirely consistent. These remarks have nothing to do with the decision of Stirling J. in the case of *In re Marquis of Ailesbury and Lord Iveagh.* (1) That decision is now, at all events until disturbed by higher authority, part of the law of this Court, and I accept it without question.

My view, however, is that I am not bound by the decision of Stirling J. in the *Marquis of Ailesbury's* case (1) to force this title on a purchaser. There is a broad distinction between that case and the present one—a distinction which has been taken by the purchaser, and insisted on in answer to the vendor. It is, that whereas Stirling J. was dealing with a restored or confirmed estate for life, here I am dealing with a newly created estate for life, and that makes a difference which seems to be not merely technical but substantial. The case may be tested in two ways, but either test leads me to the same conclusion. In the first place, what is the estate for life?

(1) [1893] 2 Ch. 345.

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It is an estate newly created by the settlement of January 30, 1889, as much then created as if there had been no preceding settlement whatever, and the limitations of that settlement had arisen and been created out of an estate in fee vested in one person or several persons. For some reason that settlement was so framed as to create the estate for life then for the first time, and without resort to the well-known conveyancing form by which an estate for life created under some previous settlement is restored or confirmed, notwithstanding a disentailing assurance, so that the resettlement is really only a part of the settlement which preceded it, which itself may be a part of or supplemental to the settlement which preceded that, and so ad infinitum. It would not be difficult, I apprehend, in the archives of many families to find settlements which have gone on in this way from generation to generation. The result seems to me to be that the present tenant for life derives his title under the deed of January 30, 1889, and not under any of the other deeds relating to the property.

Try another test. What is the property settled? Without referring to the sections of the Settled Land Acts mentioned in argument and referred to in the judgment of Stirling J., it is important to see what is the settled estate. Of course, I do not draw any distinction between a settlement which does not comprise some property which was comprised in the former settlements, because, for example, it has been taken by a railway company, or because for some other reason it is desirable to put it outside the settlement and devote it to other purposes, nor do I refer to any distinction arising from the inclusion of new property, such as occurs where, on a new settlement by a tenant for life, he brings in some farms purchased out of his own money which it is desirable to add to the family estates. I think it would be a narrow view to say that a resettlement may not be and is not a part of a compound settlement because it does not contain precisely the same property. I wish to put the matter on a broader view. What is conveyed by the deed of January 30, 1889? Is it the property which was included in the former settlements or not? It may be the same acres, or some of the same acres. But that which is conveyed is what

belonged to the grantors, and what belonged to them was what had been acquired by virtue of the disentailing assurance, namely, a property subject to charges before created. The interest so limited may be rightly called an equity of redemption. They did not settle the fee, but the fee subject to certain charges. That and that only was the subject-matter of the settlement of 1889.

It seems to me that whichever test I take I am forced to the conclusion that the settlement of January 30, 1889, was a new settlement, and not part of a compound settlement. No doubt there may be advantages in the contrary view. There is great force in the interlocutory remark of Stirling J. (1): "Does anybody suffer any injury provided that proper trustees of the old instruments are appointed so as to protect the interests of all parties thereunder?" In other words, if this were a compound settlement, the money to be produced by the present sale would be subject to the charges, including jointures and portions, created by the old settlements. The charges might well be shifted from the land to the money which represents the proceeds of sale of the land, and possibly that might do those interested no harm in any way. It does not affect their legal position except so far as it gives them a charge on money to be invested in land, instead of the land itself. They may, however, be entitled to say that they would prefer a charge on the land which they have got, instead of on money which is yet to come. With that reservation I see the force of what Stirling J. says. But the real question is not whether any one would be aggrieved by the shifting of the burden from land to money, but whether the charges can be overridden at all. If I am right in my view, there is a new estate for life, newly created, arising out of the fee simple derived under the disentailing assurance, and that which was settled in 1889 was an estate in fee subject to charges. To uphold the vendor's view would be to say that he has power, by a sale under the Settled Land Acts, to do that which under a power of sale in the ordinary form vested in trustees could not be done, namely, to get rid of charges subject to which the settlement, which contains the

(1) [1893] 2 Ch. 350.

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power of sale, was made. I apprehend that to be against all principle, and I see nothing in the Act of Parliament which enables me to say so. It comes back to this: if the settlement of 1889 is really part of a compound settlement, the tenant for life can sell the whole property free from the charges, and they can be provided for by shifting them on to the proceeds of sale; but if it is not a compound settlement, then these charges are outstanding and unaffected by the new settlement and are paramount to it. Is or is not this a compound settlement? I say it is not for the reasons I have given; and I hold that the estate of the tenant for life is an estate newly created by the deed of January 30, 1889, and not a continuance of his former estate. It follows that the vendor is not entitled to the relief asked for by the summons.

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The tenant for life appealed. The appeal came on for hearing on November 8, 1898.

Cozens-Hardy, Q.C., and *Martelli*, for the appellant (after using the arguments already reported). The object of the Act of 1882 is to make settled land more marketable without prejudicing the rights of the persons entitled under the settlement; and we ask the Court to put a construction upon it which will carry out that object, and substitute the purchase-money for the estate, by throwing upon the money the burden on the estate. If the judgment of the Court below is allowed to stand, the objects of the Act will be defeated and the land cannot be sold, for, owing to the infancy of some of the portioners, they cannot join in any conveyance. The Act of 1882 provides, in s. 20, that a conveyance by the tenant for life is to be "effectual to pass the land conveyed . . . . discharged from . . . . all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (i.) all estates, interests, and charges having priority to the settlement;" or (inter alia) which have been created for securing money actually raised at the date of the deed. Our contention is that the deeds of 1889, together with the previous deeds of 1861 and 1865, constitute "the settlement," that the jointures and portions were

posterior to the estate of the tenant for life, and cannot affect it. They could not by their very nature come into operation until after the determination of the estate of the tenant for life, and they do not take effect at all out of that estate: *In re Marquis of Ailesbury and Lord Iveagh* (1); *Lord Henry Bruce* v. *Marquis of Ailesbury* (2); Hood and Challis' Conveyancing and Settled Land Acts, 5th ed. pp. 193, 194, 225; Wolstenholme's Conveyancing and Settled Land Acts, 7th ed. p. 289. The mere omission from the deed of resettlement of January 30 1889, of words expressing that the limitation of the life estate was to be in restoration or in confirmation of the former life estate cannot have the effect of postponing the life estate thereby limited, in the absence of any indication of intention to that effect. The postponement of the vendor's life estate so as to give priority to the charges would be clearly contrary to the intention of the parties to this family arrangement, and would defeat the main object of the Settled Land Act: *Lord Henry Bruce* v. *Marquis of Ailesbury*. (3)

W. A. Peck, for the respondents, the purchasers. The objection of the purchaser is that in the limitations of the resettlement of January 30, 1889, the former life estate of the vendor was not kept alive in the usual way by words of restoration or continuation and confirmation. In 1865, in exercise of the power reserved to him in the marriage settlement of 1861, the vendor charged the estate in favour of his wife and younger children; and he cannot now override those charges even if trustees are now appointed. His former life estate under the deed of 1861 is gone, and the charges have priority over his new life estate under the resettlement of January 30, 1889. So that the vendor cannot sell free from these charges except with the concurrence of the persons entitled thereto. To obviate difficulties of this kind, it has always been the practice of conveyancers upon resettlements of this character to preserve the life estate by relimiting the estate with the annexed powers by way of preservation or restoration, and also to insert a distinct clause providing for the resettlement being overreached

(1) [1893] 2 Ch. 345. (2) [1892] A. C. 356.
(3) [1892] A. C. 364.

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by the exercise of the old powers: Davidson's Precedents, 3rd ed. vol. 3, Part I. pp. 594–7; Part II. p. 1039; Key and Elphinstone's Precedents, 5th ed. vol. 1, p. 631; Wolstenholme on the Conveyancing and Settled Land Acts, 7th ed. pp. 289, 322; *In re Wright's Trustees and Marshall.* (1)

These words of preservation or restoration have always been regarded as essential, and there is no instance in the books shewing that they can be safely omitted. Looking, therefore, at all these deeds, the only one under which the vendor can exercise the powers of sale given to a tenant for life by the Settled Land Act, or can obtain the appointment of new trustees, is the deed of January 30, 1889. That is the "settlement" under which he is tenant for life within the meaning of s. 2, sub-s. 5, and he cannot override charges which have priority to that settlement, although it may be that they take effect on the determination of his life estate: see s. 20, sub-s. 2 (i.) of the Act of 1882.

The tenant for life under the deed of 1889 cannot ask the Court to appoint trustees of the deed of 1861.

The decision in *In re Marquis of Ailesbury and Lord Iveagh* (2) is distinguishable. There was in that case a life estate arising under an original settlement and restored by a subsequent resettlement of the Savernake estate. (3) It is true that this life estate was that of Ernest, Marquis of Ailesbury, and not that of his grandson the vendor tenant for life, whose life estate arose for the first time under the resettlement. But the life estate of Marquis Ernest formed a connecting link between the settlement and the resettlement; and it was this circumstance which enabled Stirling J. to hold, as he did, that the deeds in question constituted a compound settlement of which trustees could be appointed, so that the vendor could override by his conveyance the jointure rentcharge of Lady Evelyn Riddell, which had priority to the resettlement. This appears from the passage in the judgment at the bottom of page 356. Stirling J. held in effect that the fact of this connecting link having once been in existence

(1) (1884) 28 Ch. D. 93. (2) [1893] 2 Ch. 345.
(3) [1893] 2 Ch. 347.

enured for the benefit of the vendor, the tenant for life in remainder, whose life estate was limited to him for the first time by the resettlement, so as to enable him when in possession to override by his conveyance the jointure which arose under the old settlement, and which had priority to the resettlement. This is the point on which the decision of Stirling J. has been doubted. For if it had been Marquis Ernest (and not his grandson) who contracted to sell the estate to Lord Iveagh, it is obvious that he could have conveyed free from the jointure which arose under the instrument which created his own life estate.

There is nothing like this on the title now before the Court. The vendor's life estate under the settlement of 1861 has been destroyed altogether; and was not restored or renewed by the resettlement of 1889. If it had been, this case would have been identical with that of the life estate of Marquis Ernest in the *Ailesbury* case (1), and this question would never have arisen. But here there is not and never has been any connecting link between settlement and resettlement; and in the absence of such a link, a compound settlement cannot be created by merely appointing trustees of a series of unconnected deeds.

Thus the *Ailesbury* case (1) is really no authority upon the present question.

It was argued in that case that the jointresses and the tenant for life took by way of succession; but a jointure has usually been considered not as an estate, but as an incumbrance, and this seems to have been the view taken by Stirling J. at p. 357 of the report.

[The learned counsel also referred to *In re Tibbits' Settled Estates* (2) and *In re Du Cane and Nettlefold's Contract.* (3)]

Cozens-Hardy, Q.C., in reply. Before the deeds of 1889 were executed the vendor had, as tenant for life, a statutory power of sale under the Act of 1882, and that power still remains; for under s. 50 of the Act the powers of a tenant for life thereunder are incapable of assignment or release, and remain exercisable

(1) [1893] 2 Ch. 345. (2) [1897] 2 Ch. 149.
(3) [1898] 2 Ch. 96.

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by him, notwithstanding any assignment by operation of law or otherwise of his estate or interest under the settlement.

Cur. adv. vult.

Dec. 20. The judgment of Lindley M.R. and Chitty L.J. was delivered by

CHITTY L.J. On this appeal there are two questions which hang together:—

(1.) The first is whether the vendor, who is tenant for life in possession, can by his conveyance under the Settled Land Acts discharge the land from the jointure limited to his wife, if she should survive him, and from the portions charged on the land in favour of his younger children, but not raiseable till after his death. The terms of years and other interests limited for the purpose of securing the jointure and portions are included in this question.

(2.) The second is whether the deeds of 1861, 1865, and 1889 together constitute "the settlement" or "a settlement" within the meaning of the Act. The vendor contends that they do, and accordingly asks the Court to appoint trustees of that settlement in order that they may receive and give a good discharge for the purchase-money. Kekewich J. has decided both the questions against the vendor, and has consequently declined to appoint trustees.

The broad policy on which the Act is founded is laid down by the House of Lords: *Lord Henry Bruce* v. *Marquis of Ailesbury*. (1) The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of the fetters imposed by settlement; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with the

(1) [1892] A. C. 356.

land by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase-money which has to be paid into court or into the hands of trustees. The Act of 1882 and the subsequent Acts ought, then, to be construed by the Court with regard to these broad principles and in a spirit of wise and reasonable liberality.

I am free to confess that I am struck at the outset with the consideration that, if the judgment appealed against stands, there is a blot in the Acts. The purchasers required that the jointress and the younger children should join in the conveyance for the purpose of releasing their rights; but with this requisition it was impossible to comply. The portioners, or some of them, are infants. The result, then, is that, if the requisition is upheld, the land is practically unmarketable.

The 20th section of the Act of 1882 has been so often stated that it is unnecessary to set it forth again. The deed of conveyance by the tenant for life is effectual to pass the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (i.) all estates, interests, and charges having priority to the settlement, and (ii.) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed." The third exception is for present purposes altogether immaterial. The second is important, as shewing an express restriction on the power of the tenant for life. We find in it a principle. Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life. The same principle is maintained in the 3rd sub-section of s. 50 in favour of an assignee for value of the estate or interest of the tenant for life. The exception in

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sub-s. 2 (ii.) of the 20th section has, however, no direct application to the present case, because no money has been raised under the jointure term or the portions. Indeed, as already intimated, no money is raiseable under either of them till after the death of the vendor. The first exception is important. If the settlement consists solely of the deed of 1889, then the jointure and the portions have priority to the settlement, and the vendor's conveyance will not discharge the land from them. If the settlement consists of the deeds of 1861, 1865, and 1889, the jointure and portions will not have priority to that settlement, and they will be discharged, subject to compliance with the provisions of the Acts as to the appointment of trustees of that settlement, and notice to them or waiver of notice. The purchasers raise no objection on the ground that there were no trustees for the purposes of the Act at the time of the sale.

I turn now to the 2nd section of the Act of 1882, the 1st subsection of which for the present purpose may be shortly stated thus: "Any deed . . . . or other instrument, or any number of instruments, whether made . . . . before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." The right interpretation of the words "stands for the time being limited to or in trust for any persons by way of succession" is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally, and without reference to the Acts imposing a duty on successions; but such Acts

if referred to would support this proposition. It may be that conveyancers, when they employ the phrase that the lands stand limited to uses, often mention only the leading estates in the land, namely, the estates of freehold, and refer to jointures and portions as charges or incumbrances to which the freehold estates or some of them are subject. Such a mode of reciting title is often sufficient for the purpose which it is intended to serve. But it is quite correct in point of law to set out among the limitations to which the land stands limited the limitations in favour of the jointress and the portioners and the terms for securing them, and this is often done by conveyancers. There is an illustration of what I am saying in the deed of 1889. To the proposition that the words of the definition "stands . . . . limited to or in trust for any persons by way of succession" ought to be restricted to freehold estates, there are two ready answers. First, the subject-matter of the settlement may be leaseholds for years. This is shewn by the words of the definition itself, which speaks not merely of land, but of "any estate or interest in land." And, secondly, by the 58th section, which in its enumeration of the persons having the powers of a tenant for life mentions (sub-s. 4) a tenant for years determinable on life, not holding merely under a lease at a rent.

I proceed now to state the title shortly. The deed of 1861 was a settlement under which the vendor took a life estate, with powers to jointure and charge portions in the usual way. The deed of 1865 was executed by the vendor on the occasion of his marriage, and he thereby exercised his powers of jointuring and charging portions. The deeds of 1889 were a disentailing deed by the vendor and his eldest son, followed by a resettlement. The resettlement contains a correct recital shewing how the lands "stood limited" immediately before the execution of the disentailing instrument. It will suffice to state the title from this recital, following its main lines, but slightly abbreviating its language. According to the recital the lands then "stood limited" (*a*) to the use that the vendor's mother Elizabeth Susan Mundy should receive during her life a yearly rent-charge of 800*l.*, with power of distress and entry (she died in 1892); (*b*) to the use of trustees for a term (created

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by the deed of 1861) of 500 years to secure that rent-charge. And subject thereto (*c*) to the use of trustees for a term (created by the deed of 1861) of 1000 years upon trust for raising 8000*l.* for the portions of the younger brother and three sisters of the vendor, all of whom had acquired vested interests in the 8000*l.* And subject thereto, (*d*) to the use of a trustee named by the vendor for a term of 1000 years to secure 10,000*l.* by deed dated June 5, 1861, charged by the vendor in his own favour on the lands, pursuant to a power conferred upon him by the deed of resettlement of 1861 already mentioned, and which sum was subsequently raised by mortgage and was then repayable to the persons named; and subject thereto, (*e*) to the use of the vendor for his life; and subject thereto, (*f*) to the use of trustees for a term of 300 years to commence from the vendor's death created by the marriage settlement of 1865, to secure to the vendor's wife a jointure rent-charge of 500*l.* a year for her life in case she should survive the vendor (she is still living), and to commence from his death; and subject thereto, (*g*) to the use of trustees for a term of 1500 years to be computed from the vendor's death (created by the marriage settlement of 1865) to secure 8000*l.* for the portions of the vendor's younger children, no part of which had then become vested; and subject thereto, (*h*) to the use of the vendor's eldest son in tail male, who was then living and of age.

Such being the state of the title immediately before the execution of the disentailing deed and the resettlement of 1889, it is plain that the vendor as tenant for life in possession had immediately upon the commencement of the Settled Land Act, 1882, become entitled by virtue of that Act to a power (which continued to subsist in 1889) to sell the land discharged from the jointure of his wife, and the portions for his younger children, and from the terms to secure the same respectively. He had also the power of leasing, and other the powers conferred on a tenant for life by that statute. I may here mention that he had also extensive powers of leasing annexed to his life estate by the deed of 1861.

The resettlement of 1889 was executed to give effect to a general family arrangement.

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The parties to the deed were the vendor, his eldest son, the vendor's mother the jointress, the vendor's younger brother and three sisters, or the representatives of such of them as were dead, the vendor's wife, and trustees for the purposes of the resettlement. The nature of the family arrangement is stated in a recital to the following effect. (*a*) That the vendor's eldest son, with the consent of the vendor as protector, should bar his estate tail; (*b*) that they should concur in a resettlement in manner after expressed; (*c*) that the trustees of the resettlement should have power to pay off the existing mortgages for 16,000*l.* and 10,000*l.*, and to borrow and secure the necessary money on a first mortgage of the lands; (*d*) that the vendor should have power to borrow not exceeding 5000*l.* on the lands, binding himself on that event to assign certain life policies; (*e*) that the vendor's mother and wife should postpone their respective jointures in favour of persons claiming under mortgages to be created under clauses (*c*) and (*d*); (*f*) that all persons legally or beneficially interested in the 8000*l.* portions of the vendor's younger brother and three sisters should concur in releasing the lands therefrom to the intent that the same, and the term for securing the same, might determine, and in lieu thereof the rent-charges thereafter received should be secured to the two sisters then living for their lives and the life of the survivor; (*g*) that an immediate income of 150*l.* should be provided for the vendor's eldest son, in manner after expressed, to be increased to 200*l.* in the events after mentioned; (*h*) that the lands should be limited to the several uses, and subject to the several powers, and in manner after expressed.

The disentailing deed was in the usual form. The vendor, so far as related to his estate for life, granted, and his son with the vendor's consent as protector, granted and disposed of the lands to the grantee to uses, for such uses as the vendor and his sons should jointly appoint, and subject thereto to the old uses, trusts, and powers, so as to restore the same.

The resettlement of 1889 was so framed as to carry into effect the family arrangement recited. It is unnecessary to state further the operative parts of the deed, beyond saying

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that the power of joint appointment was executed, and that, subject to the other provisions indicated by the recital, the lands were limited to the use of the vendor for life, so that upon the execution of the deed he again became tenant for life in possession. But this life estate was not in terms limited to him in restoration of his old life estate. The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate: see 3 Davidson's Precedents, 3rd ed. p. 594, et seq. Regard being had to the limitation in the disentailing deed in default of appointment, it would appear to have been thought unnecessary to restore the old life estate, because the powers to jointure and appoint portions had already been exercised by the vendor by the deed of 1865; and as to the leasing powers in the deed of 1861, it was thought unnecessary to keep them any longer on foot, seeing that the vendor, as tenant for life under the resettlement, had ample powers of leasing by virtue of the Settled Land Acts. But, however this may be, the old life estate was not restored. The resettlement did not and could not affect the portions limited for the vendor's younger children and the terms to secure them, nor, save as to the limited postponement agreed upon, did it affect the jointures of the vendor's wife, or the term whereby it was secured.

The result thus far appears to me to be this. Treating the life estate of the vendor (as I think it must be treated) as a new life estate arising under the resettlement, the land now stands limited to the vendor for life, and after his death to the use of his wife for her rent-charge, and for the portioners, with their respective terms by way of succession within the meaning of the definition contained in s. 2, sub-s. 1, of the Act of 1882; and the settlement consists of the deeds of 1861, 1865, and 1889. This result is in accordance with Stirling J.'s decision in *In re Marquis of Ailesbury and Lord Iveagh*. (1) The judgment in that case has been criticised by some learned writers, particularly in regard to the jointure of Maria the Dowager Marchioness. But I think the judgment was right and founded on the true view of the statute. It was held that the settlement was made

(1) [1893] 2 Ch. 345.

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up of the series of deeds, beginning with the deed of 1796, and ending with the deed of 1885; and that, treating these deeds as the settlement, the vendor, who was tenant for life in possession under the deed of 1885 only, had power to bind the jointure of the Dowager Marchioness which arose under the earlier deeds of the series, namely, those of 1796, 1826, and 1833, and also to bind the jointure of Lady Evelyn Riddell which arose under the intermediate deed of 1863. It was no doubt a circumstance in that case that by the deed of 1885 the life estate of the Marquis Ernest under the deed of 1863 was restored to him; and this circumstance in connection with sub-s. 4 of s. 2, relating to the time of the settlement taking effect, was relied upon by the learned judge. But this circumstance would not have carried the compound settlement further back than the deed of 1863. He held, however, that the Savernake estate stood limited to uses in favour of various persons by way of succession under or by virtue of the series of deeds, and that the Marchioness Maria was one of the persons taking under the series of deeds, although she did not take by way of succession to the vendor. This was a broad view of the Act; but I repeat that, in my opinion, it was the right view.

But holding as I do, that there is a settlement consisting of the four deeds within the definition, there is a point which ought not to be overlooked. The resettlement of 1889 expressly appoints trustees of the settlement thereby made for the purposes of the Settled Land Acts. I think that the vendor could have sold the land and discharged it from the limitations thereby made, but, of course, subject to the jointure and portions of his wife and younger children, which upon such a sale would stand in priority to that settlement, and that the trustees thereby appointed could have given a valid discharge for such purchase-money.

I see no inconsistency in holding that there may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds only. The language of the 2nd section, sub-s. 1, any "instrument or any number of instruments" whereby the land "stands for the time being limited," justifies

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this conclusion. Had I been of a different opinion on this point, I might have found some difficulty on the main questions involved in our present decision. The point, however, was decided by Stirling J. in *In re Du Cane and Nettlefold's Contract.* (1) In his judgment on that case he said that it is quite plain that one instrument may constitute a settlement, although it is to be admitted that several instruments may under the same definition also constitute a settlement. I agree with his reasoning and with his decision on this point.

There is also another but quite distinct point which arises on this title. As already stated, the vendor, being tenant for life under the settlement of 1861, became entitled on the commencement of the Act of 1882 to sell the land discharged from the jointure and portions of his wife and younger children, and this statutory power remained vested in him beyond all question down to the date of the execution of the disentailing deed. How and by what means has this power been divested? It seems to me clear that the statutory power is not a power annexed to the estate of a tenant for life in any such sense as that in which powers were considered to be annexed to an estate by any method of conveyancing arising out of the private deeds of the parties. It is a power vested by the Act once for all in a tenant for life, which remains vested in him, is incapable of being assigned or released, and continues exercisable by him notwithstanding any assignment by him of his estate. This is the effect of the 50th section of the Act of 1882, which runs thus:—

Sub-s. 1: "The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement."

Sub-s. 2: "A contract by a tenant for life not to exercise any of his powers under this Act is void."

It may be that if the settlement consists merely of a life

(1) [1898] 2 Ch. 96.

estate in A. with remainder to B. in fee, and A. surrenders his life estate to B., the power is gone under the doctrine of merger; and that such a case is not within the section, because where the settlement is thus brought to an end and exhausted there is no reason why such a power should continue after the absolute fee simple is vested in possession. I say "may be," because it is not necessary to consider such a case, which does not arise upon the facts before us.

Reading the declaration of uses declared by the resettlement with the disentailing deed according to the settled law on that subject, how does the present case stand? By virtue of the grant made by the vendor and his son by the disentailing deed, the common law estate passed to the grantee to uses; and by virtue of the declaration of uses in the resettlement the grantee to uses stood seised to the use of the vendor for life. The old life estate of the vendor alone was sufficient to support this use in favour of the vendor. But, apart from these technical points, I still ask the question how, upon such a transaction as that manifested by the disentailing deed and resettlement of 1889, can it be said in the face of the 50th section that the statutory power of sale which the vendor had at the time when he executed those deeds is gone or extinguished? In my opinion the 50th section applies, and the statutory power of sale remains unaffected.

VAUGHAN WILLIAMS L.J. I agree, but I confess with a great deal of hesitation, for in a case in which an estate in fee simple is settled in the ordinary way, with a succession of limitations consisting of a life estate, estate tail, etc., with the ordinary power of creating terms to secure jointures and portions for younger children, I doubt very much whether the terms to secure jointures or portions, or the interests thereby secured, are limitations by way of succession within the meaning of s. 2 of the Settled Land Act. This doubt is not based upon any question of the applicability of the words "stand limited" to the estate created "by a term of years," but is based on the consideration that such a term does not come into operation in succession in relation to the freehold limitations,

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estates tail, and estates in remainder and reversion, which exhaust the whole fee. Such terms are in fact mere charges overriding the successive limitations, and coming into operation contemporaneously with those limitations. To express this doubt by another example, I doubt whether land would continue to stand limited by way of succession in a case where a settlement created a life estate with remainder in fee, with power to the tenant for life to jointure and portion, and create terms to secure jointures and portions, and the tenant for life died after creating such terms, and the remainderman became tenant in fee in possession subject to the terms. I mean that I doubt if in such a case the terms and the reversion vested in the remainderman, his estate being in possession, constitute a limitation by way of succession; but, having regard to what was said in the House of Lords in *Lord Henry Bruce* v. *Marquis of Ailesbury* (1) as to the policy of the Act, Chitty L.J.'s judgment has convinced me that we ought to construe s. 2 of the Act of 1882 in the way he has done, although we may be putting a somewhat unnatural meaning on the words. I am not, however, influenced in this by the presence in s. 58, sub-s. 1, of clause 4, because I think that clause was inserted merely to prevent an old conveyancing device to render difficult the suffering of a recovery to bar an entail being effective to avoid the application of the Settled Land Act by the absence of a life estate.

Feb. 2. The order made, as entered on this day, was, omitting the formal parts thereof, as follows:—

This Court doth order that the said order dated the 14th May, 1898, be discharged except so far as it declares that the applicant as tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, under the above-mentioned settlement dated the 30th January, 1889, has power to sell the estate free from the rent-charges limited by the above-mentioned settlement dated the 30th January, 1889, in favour of Millicent Harriet Massingberd Mundy and Sophy Jane Massingberd Mundy.

And this Court doth hereby appoint William Oswald Massingberd, of Ormsby Rectory, near Alford, in the county of Lincoln, Clerk in Holy Orders, Lewis

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(1) [1892] A. C. 356.

Amherst Selby Bigge, of 43, Elvaston Place, Queen's Gate, in the county of Middlesex, one of Her Majesty's Assistant Charity Commissioners, and Stephen Massingberd, of Gunly Hall, near Burgh, in the said county of Lincoln, Esquire, trustees under the settlement effected by the above-mentioned instruments for the purposes of the Settled Land Acts, 1882 to 1890.

And this Court doth declare that Millicent Harriet Massingberd Mundy, Sophy Jane Massingberd Mundy, and Louisa Charlotte Massingberd Mundy, and Philippa Alice Massingberd Mundy, Godfrey Bertram Massingberd Mundy, Oswald Francis Massingberd Mundy, and Henry Louis Massingberd Mundy, annuitants, jointress, and portionists respectively under the above-mentioned instruments, are respectively bound by the above-mentioned contract, and that the applicant Charles Francis Massingberd Mundy as tenant for life under the said settlement effected by the above-mentioned instruments having power to convey the above-mentioned estate free from the respective terms of years whereby their jointure and portions are respectively secured and discharged from such rent-charges or annuities, jointure, and portions respectively, the said Findlater Laurence Roper, Arthur Granville Fletcher, and John Saul Sills are not entitled to require the concurrence in the conveyance to them of the hereditaments comprised in the above-mentioned contract of the said Millicent Harriet Massingberd Mundy or Sophy Jane Massingberd Mundy, Louisa Charlotte Massingberd Mundy or Philippa Alice Massingberd Mundy, Godfrey Bertram Massingberd Mundy, Oswald Francis Massingberd Mundy or Henry Louis Massingberd Mundy or of the trustees of the said respective terms of years, and that the objections of the purchasers to the title to the said hereditaments have been sufficiently answered by the vendor, and that a good title to the said hereditaments has been shewn, and doth order that the costs, charges, and expenses of the applicant be paid out of the property subject to the settlement, including the purchase-money to be paid under but not the hereditaments comprised in the above-mentioned contract. And any of the parties are to be at liberty to apply as they may be advised.

Solicitors: *Jull, Godfrey & Danvers, for Thimbleby & Son, Spilsby; John Hextall, for A. G. Fletcher, Donington.*

W. W. K.

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E. UNDERWOOD & SON, LIMITED *v.* BARKER.

[1898 E. 1453.]

Covenant in Restraint of Trade — Validity — Reasonable Protection of Covenantee—Public Policy.

The plaintiffs, hay and straw merchants, at Brentford, who carried on an extensive wholesale and retail trade, in the United Kingdom, France, Belgium, and Canada, and had permanent places of business in the United Kingdom and France in October, 1897, agreed to employ the defendant as their clerk and foreman, in Calais or elsewhere, at a weekly wage of 35*s*. The defendant entered into a covenant that he would not, for the space of twelve months next after his leaving or being dismissed, carry on the business of a hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of a hay and straw merchant, in the United Kingdom, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada. The defendant continued in the plaintiffs' employment until November, 1898, when he voluntarily left them, and entered into the employment of a rival hay and straw merchant in London :—

Held (by Lindley M.R. and Rigby L.J., Vaughan Williams L.J. dissenting), that the restraint imposed on the defendant was not unreasonable, at any rate so far as the United Kingdom was concerned; that the covenant was not void on any ground of public policy; and that the defendant must be restrained from violating his covenant :

Held, by Vaughan Williams L.J., that the covenant was unreasonable and invalid, and ought not to be enforced by injunction.

Decision of Kekewich J. affirmed.

Per Lindley M.R. and Rigby L.J.: A covenant in restraint of trade, which is not wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy, unless some specific ground for so holding it void can be clearly established. But such cases are exceptional.

Per Vaughan Williams L.J.: The old rule of law that all covenants in restraint of trade are primâ facie contrary to public policy, and therefore void, has not been rescinded by recent decisions.

APPEAL against an order of Kekewich J. restraining the defendant, W. H. Barker, "until judgment in the action or further order, from carrying on the business of a hay and straw merchant, or entering into or remaining in the service of, or acting as agent for, Mr. Kitts, hay and straw merchant, carrying on business in the City of London, or entering into the

service of, or acting as agent for, any person or persons carrying on the business of hay and straw merchants, or trading in hay and straw, in the United Kingdom of Great Britain and Ireland, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada."

The plaintiff company carried on the business of hay and straw merchants, doing an extensive wholesale and retail trade, buying and selling hay and straw from all parts of the United Kingdom, France, Belgium, Holland, and Canada. They also had permanent places of business in the United Kingdom and France.

On October 26, 1897, the plaintiffs took the defendant into their employment, and a written agreement was entered into between the plaintiffs and the defendant by which he agreed to serve the plaintiffs, and the plaintiffs agreed to employ him as their clerk and foreman, in Calais or elsewhere, at a weekly wage of 35*s*. The agreement contained the following provisions: "The said W. H. Barker is to do everything in his power to increase and improve the business of the said E. Underwood & Son, Limited, and will obey all their lawful commands, either by themselves or by their manager; and he further particularly agrees that he will not, for the space of twelve months next after his leaving or being dismissed, carry on the business of a hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchants in the United Kingdom of Great Britain and Ireland, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada. And he further agrees that, for the space of five years after his leaving, he will not, either on his own account or as agent for others, be in any way engaged in the carrying on of hay and straw or like business in the Republic of France, and will, in the event of his breaking this agreement by carrying on, or in any other way engaging himself in, the trade or business of a hay and straw merchant, pay to the said E. Underwood & Son, Limited, 500*l*., as and for liquidated damages, and not by way of penalty."

The circumstances which gave rise to the action were thus

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stated in an affidavit made by Mr. H. T. Underwood, a director of the plaintiff company.

"4. The plaintiff company continued to employ the defendant under the agreement at Calais for about four months, after which the plaintiff company removed him to London at an increased wage, and continued to employ him there until November 12, 1898, when he of his own free will left its employment, and, as I have since—viz., on November 14, 1898—ascertained, entered the service of Mr. Kitts, who carries on the business of a hay and straw merchant, and trades in hay and straw at 37 and 38, Mark Lane, in the City of London, and the defendant now continues in his service and employment.

"5. Mr. Kitts is a very keen competitor of the plaintiff company in its said business, and the defendant has obtained during his service with the plaintiff company under the agreement valuable information as to the manner in which the plaintiff company conducts its business, and as to the names and addresses of the persons from whom the plaintiff company purchases hay and straw, and as to the names and addresses of its customers, and the plaintiff company apprehends that, unless the defendant is restrained from continuing in the service of Mr. Kitts, serious injury will be done to the plaintiff company in its business."

This evidence was not contradicted by the defendant.

On the motion of the plaintiff company Kekewich J. granted an injunction in the terms above stated.

The defendant appealed.

H. Dobb, for the defendant. The covenant is too wide in its terms. It goes further than is reasonably necessary for the protection of the plaintiffs in their business, and it is void as against public policy. The effect of the covenant is, that the defendant is not in any part of the world to enter into the employment of any rival in trade of the plaintiffs carrying on business anywhere in the countries mentioned. In substance it would prevent the defendant from carrying on his trade at all, and would deprive him of the means of earning his living. This would be utterly unreasonable. *Nordenfelt* v. *Maxim*

Nordenfelt Guns and Ammunition Co. (1) has laid down the law as to such covenants.

[Lindley M.R. referred to *Hitchcock* v. *Coker*. (2)]

E. Clayton, for the plaintiffs. No doubt a general covenant in restraint of trade is bad, i.e., a covenant without any limitation as to either time or space. The covenant must have some limitation either as to time or as to space, but, if one of those limitations is to be found, the burden then lies on the covenantor to shew that the covenant is not reasonably required for the protection of the covenantee: *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (3) In that case Chitty J. summed up the law on the subject, and laid it down that a limitation in time may render a limitation in space unnecessary. *Davies* v. *Davies* (4) is to the same effect. *Rousillon* v. *Rousillon* (5) was a stronger case than the present. There the covenant (which the Court enforced by injunction) was unlimited as regards space, but was limited to ten years. The fact that a man has entered into such a covenant is enough to throw upon him the burden of shewing that it is unreasonable. *William Robinson & Co.* v. *Heuer* (6) is to the same effect. It has not been shewn that the defendant's covenant goes further than is reasonably required for the protection of the plaintiffs, having regard to the nature of their business. The defendant is prohibited from taking as the basis of his operations any of the places named in the covenant.

H. Dobb, in reply. In cases such as *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1), which arose between the vendor and the purchaser of a business, an exception has been admitted from the old rule that such covenants are primâ facie invalid. No such exception has yet been admitted in a case of master and servant.

Cur. adv. vult.

Jan. 31. Lindley M.R. The law as now settled cannot, in my opinion, be more accurately expressed than it was by

(1) [1894] A. C. 535.
(2) (1837) 6 Ad. & E. 438.
(3) [1892] 3 Ch. 447, 451.
(4) (1887) 36 Ch. D. 359, 382.
(5) (1880) 14 Ch. D. 351.
(6) [1898] 2 Ch. 451.

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Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1) He said: "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad. See as to this *Baines* v. *Geary* (2) and *Nordenfelt's Case* (3), where the clause was severable, and *Perls* v. *Saalfeld* (4), where it was not. Further, it is now settled that, unless there are circumstances shewing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, that restriction will be held not binding upon him. According to this doctrine an agreement in restraint of trade which is wider than is reasonably necessary for the protection of the person seeking to enforce it is invalid so far as it is wider than is so necessary, and this may invalidate the whole

(1) [1894] A. C. 565.
(2) (1887) 35 Ch. D. 154.
(3) [1893] 1 Ch. 630.
(4) [1892] 2 Ch. 149.

restraint sought to be imposed if the clause imposing it is so framed as not to be severable. See the three last-mentioned cases and *Rogers* v. *Maddocks*. (1) But where an agreement restraining a person from carrying on business is entered into with another person engaged in a similar business for the purpose of protecting him from rivalry in that business, and is no wider than is reasonably necessary for his protection in that business, it is difficult to imagine the circumstances which can render such an agreement injurious to the public interests of this country. As was pointed out by Lord Macnaghten in *Nordenfelt's Case* (2), what may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer; but I do not understand him as saying that a restriction which is reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established. If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, primâ facie at all events, contrary to the interests of any and every country. Of course I am not speaking of contracts induced by fraud, duress, or undue influence, or impeachable on any other recognised ground of invalidity. Omitting all such cases, the public policy which allows a person who obtains employment, on certain terms understood and agreed to by him, to repudiate his contract conflicts with and must to avail the defendant prevail for some sufficient reason over the manifest public policy which, as a rule, holds him to his bargain. I do not say that no such case can arise, even where the terms impose a restriction on his liberty no wider than mentioned above, but at this moment no example of such a case, short of some pernicious monopoly, occurs to me. In *Dubowski & Sons* v. *Goldstein* (3) the Court, influenced no doubt by these

(1) [1892] 3 Ch. 346. (2) [1894] A. C. 566, 567.
(3) [1896] 1 Q. B. 478.

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considerations, treated the reasonableness of the restriction for the protection of the employer as the general practical test in cases of this description. The fact that the person restricted is out of work, and is seeking employment, and is therefore at a disadvantage in making a bargain, cannot be a ground for holding his bargain invalid, unless some unfair advantage is taken of his position; and, so long as his bargain is reasonable, having regard to the protection of the employer, it cannot be truly said that any unfair advantage is taken. In this particular case oppression is not even suggested. Nothing could be more kind and considerate than the treatment of the defendant by the plaintiffs. I can find no circumstance to relieve the defendant from his bargain on the ground of public policy, if the restraint put upon him is no wider than is required for the protection of the plaintiffs in their business. This question turns on the nature of their business and on the true construction of the contract, and to these I will now allude. [His Lordship referred to Underwood's affidavit and to the contract, and continued:—]

The defendant's counsel asked us to put a very far-fetched, and I think unreasonable, construction on this contract. He contended that if the defendant in any part of the world acted for any hay merchant carrying on business in any of the enumerated countries the defendant would be guilty of a breach of his contract. But, as pointed out in *Dubowski & Sons* v. *Goldstein* (1), the contract must be construed with reference to the business of the plaintiffs which it was the object of the parties to protect. This is good law and good sense, and, guided by this principle, I am of opinion that the restriction imposed on the defendant is not so wide as is suggested by his counsel and is not wider than is reasonably required for the protection of the plaintiffs, regard being had to the nature of their business and the injury which the defendant could inflict upon them, by competing with them himself, or by entering into the service or acting as the agent of rival hay merchants, in the countries where they carried on their business. The restriction is limited to a year and, as I read the agree-

(1) [1896] 1 Q. B. 478.

ment, to the places specified in it. It is to be taken as proved that it is important to the plaintiffs that their rivals should not know either to whom the plaintiffs sold their hay or where they got it from. The defendant was engaged as their clerk and foreman, and would, whilst acting as such, obtain information on these matters, and such information would, if imparted to a rival in trade, greatly benefit him and proportionately injure the plaintiffs. These circumstances appear to me to distinguish this case from *Ward* v. *Byrne* (1), which is nearer the present case than any other. There the plaintiffs were coal merchants, and the defendant was their town traveller and collecting clerk, and he agreed not to follow or be engaged in the business of a coal merchant for nine months after he should leave the plaintiffs' employ. This agreement was held invalid, on the ground that it was unlimited in point of space. This case was much discussed in *Nordenfelt's Case*. (2) The restraint was considered unreasonably wide, and I think myself that it was so ; but after *Nordenfelt's Case* (2) it does not follow that all agreements not to carry on or be employed in a particular business anywhere in this country are necessarily against public policy and therefore invalid. The first question in each case is, whether such a restriction is reasonable or not in the sense already explained. If it is reasonable in this sense it will be valid unless, on some other ground than its application to the whole of the United Kingdom, it can be held to be against public policy. In the face of the evidence adduced by the plaintiffs, and in the absence of all evidence to contradict or modify it, I do not feel compelled by *Ward* v. *Byrne* (1) to hold the restraint in the present case unreasonable, so far as this country is concerned, which is the material question, for the defendant has entered the service of a rival of the plaintiffs in this country. If the restraint is unreasonable as to the foreign countries named, which I do not think it is, still the agreement as to them is clearly severable from that part of it which relates to this country. The parties having agreed that this appeal shall be treated as an appeal from a judgment on the trial, an injunction must be granted in the terms of the contract,

(1) (1839) 5 M. & W. 548. (2) [1894] A. C. 535.

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and the defendant must be ordered to pay the costs of the action and of this appeal.

Rigby L.J. I agree with all that has been said by the Master of the Rolls, and therefore give only a comparatively short judgment.

The law as to contracts in restraint of trade was originally founded on public policy according to the ideas, and having regard to the business organization of the time. The whole business organization of society has been revolutionized by the use of railways, the post-office, and the telegraph, so that a single firm may have a business extending over a vastly larger portion of the earth's surface than would have been dreamt of in the days when questions similar to that raised in this action were first dealt with.

In addition to this, it has been clearly recognised in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade. I cannot, however, think that in the present case any such exceptional question of public policy is involved. I do not say that there may not be exceptional cases where public policy can be brought in, irrespectively of the reasonableness of the actual contract made.

I think that the only question here is, whether the restraint to be dealt with is reasonably necessary for the protection of the employer. In my opinion the true construction of the contract leads to the conclusion that the operative part of the bargain for the present is, that the defendant binds himself not within twelve months to enter in the United Kingdom into the service of any one carrying on the business of hay and straw merchants in the United Kingdom. Everything else appears to me to be severable, and therefore not material for present purposes.

Now it appears on the uncontradicted evidence that the plaintiff company do an extensive wholesale and retail trade, buying and selling hay and straw from all parts of the United Kingdom. Not only is this evidence (contained in the only affidavit filed in the Court below) uncontradicted, but the

defendant, when offered an opportunity of answering the affidavit, elected not to do so. In the Court of Appeal an affidavit was tendered in which the defendant deposed that he had no dealings in any way with the plaintiffs' customers, and neither travelled for nor sold or bought anything for them; but this affidavit was read by consent only on the express admission by counsel for the defendant that he did learn during his employment by the plaintiff company where their hay and straw came from, and, to a considerable extent, where they went. This was, of course, important information which would be at the disposal of another employer. I do not think, having regard to the limited time during which the restraint was to last, that it was more extensive than was necessary for the reasonable protection of the plaintiffs, and this in cases of the kind is the test of the validity of the contract.

The injunction will be made to extend to November 28, as the parties agreed that the appeal should be treated as an appeal from an order on the trial of the action.

Vaughan Williams L.J. I have arrived at a different conclusion. I cannot think that the rule of law that all covenants in restraint of trade, or binding an individual not to earn his living in the best way he can, are primâ facie (if there is nothing more) contrary to public policy, and therefore void, has been rescinded by recent decisions. Nor can I think that, when it is said that the only test by which to determine the validity or invalidity of such a covenant given for valuable consideration is its reasonableness for the protection of the trade or business of the covenantee, it is intended to leave out of consideration the question whether the particular covenant is such as to be calculated to injure the public. The ruling case as to the validity of such contracts at the present time is *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), and I think that, if the reasons for that decision given by the noble Lords are looked at, it is reasonably clear that no one of them considered that the rule of law, that contracts in restraint of trade, or in restriction of the right of every citizen to earn

(1) [1894] A. C. 535.

C. A. 1899 E. UNDERWOOD & SON, LIMITED v. BARKER. Vaughan Williams L.J.

his livelihood by any lawful industry, are primâ facie contrary to public policy and therefore void, had ceased to exist, and that no one of them considered that the test of the reasonableness of the contract for the protection of the contractee can be applied to the exclusion of the consideration how far the contract restraining individual liberty has a tendency injuriously to affect the interests of the public. Before referring to certain passages appearing in the reasons given by the respective noble Lords, I should like to call attention to the fact that, in the case then before the House, the covenant in respect of which the question arose as to its validity or invalidity, as being in restraint of trade, was entered into by the vendor of a world-wide business not to carry on anywhere in competition with the buyer the business which he was selling to him, whereas in the case now before the Court the covenant as to which the question arises as to its validity or invalidity, as being contrary to the policy of the law, was given by a servant to his master as a condition of his employment. This difference between the case in the House of Lords and the present case seems to me important, because in the decision of questions of this sort one always has to balance two considerations against each other, the one being the interest of the public in maintaining the rules of fair dealing between man and man, the other being the consideration of the interest of the public in maintaining liberty of individual action, and it seems to me that in the case of the sale of a business, while the public have the deepest interest that the contract by the seller not to compete with the buyer shall be fairly carried out, the restraint imposed by the covenant upon liberty of individual action is so slight as to be of no public interest whatever; whereas, in the case of master and servant, the servant does not enter into the contract with the same freedom of choice as that with which a person buys a business, and the restraint on the servant from earning his livelihood in the manner best suited to his capacity seems to me to be a restriction of individual liberty in which the public have a deep interest. As Lord Macnaghten said in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1): "There is

(1) [1894] A. C. 566.

obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment." And, again (1): "It has been said that when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area. That is, perhaps, a just observation in a case of apprenticeship and cases of that sort."

Lord Herschell said (2): "I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner* v. *Graves* (3), in considering whether the agreement was reasonable. Tindal C.J. said (4): 'We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable.'" And, again, Lord Herschell said, a little lower down on the same page: "I must, however, guard myself against being supposed to lay down that if this can be shewn the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest."

Lord Watson said (5): "It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the State or community. Nor is it doubtful that Courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in

(1) [1894] A. C. 567.
(2) Ibid. 549.
(3) (1831) 7 Bing. 735.
(4) Ibid. 743.
(5) [1894] A. C. 552.

C. A. 1899 E. Underwood & Son, Limited v. Barker. Vaughan Williams L.J.

prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade."

And Lord Macnaghten said (1): "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

These observations which I have quoted seem to me to shew that, in considering what is a reasonable protection for the covenantee to whom the restrictive covenant is given, one cannot leave out of consideration the interest of the public in freedom of trade and in the liberty of the covenantor to earn a livelihood in any lawful industry. Nor can one limit the consideration of the public interest to the interest of the public in the observance of the contract made for valuable consideration, but must also consider whether the bargain is one which ought to have been made or whether it is contrary to public interest, being too wide or otherwise oppressive.

Applying these principles, I have arrived at the conclusion that the restrictive covenant in the present case is unreasonable and

(1) [1894] A. C. 565.

against public interest, as being both too wide and oppressive. What are the facts? In 1890 defendant entered the service of the plaintiffs as traveller in the London district, and apparently learned the business and became a good judge of hay and straw. The contract of employment contained no restrictive covenant, and the defendant was discharged for drunkenness. After his discharge the defendant went into the service of a competitor of the plaintiffs as manager of a depot within a mile of the plaintiffs' head office, and as traveller bought and sold hay and straw in the same district. Afterwards he started as a hay and straw dealer on his own account. In so doing he seems to have acted within his legal rights. His business was not a success, and about March, 1897, he again obtained employment with the plaintiff company as manager of a branch at Plymouth; but in a short time he was again discharged for drunkenness. Later in that year he was re-engaged as foreman and clerk at the plaintiffs' depot at Calais at a weekly wage of 35*s*., but was told that, in consequence of his previous conduct, he must sign the contract containing the restrictive clause, the validity of which is in question in this action.

The defendant shortly afterwards was transferred to London at an increased wage of 2*l*. His general duty seems to have been the inspection of incoming and outgoing cargoes; but it is admitted by him that he had opportunities of learning the names and addresses of the consignors and consignees. [His Lordship read the defendant's covenant, and continued:—]

It seems to me that by this clause the defendant engaged, without any limitation in space, not to carry on the business of a hay and straw merchant, or to enter into the service of persons carrying on that business, at least within the United Kingdom.

The reason for imposing this new condition of employment seems to have been, that the defendant was well versed in the business of a hay and straw merchant, and the consideration for his binding himself not (inter alia) to take service in this business was, that he had this large general knowledge of the business and a particular knowledge gained in part five years before, and in part by a short recent employment by the

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plaintiffs in their business. I think this restriction, without limitation in space or in character of employment, was wider than was necessary for the reasonable protection of the plaintiffs, and certainly wider than was necessary to protect them from any misuse by the defendant of any new information he was likely to gain from his new employment, and I further think that it was against the public interest to take away from a man to this extent his liberty of earning anything in that which apparently was the business of his life.

No doubt the plaintiff company had treated the defendant with great kindness and consideration, but I do not think that the moral obligation not to assist the competitors of those who had shewn such kindness to him would support the validity of this contract, if the restriction was wider than was really necessary to protect the business of the plaintiffs, and I think one cannot leave out of consideration the fact that the contract debars the defendant, not only from using against the plaintiffs information which he would gain in their employment under the contract, but also from using that knowledge of the business which he had gained in the course of previous years, and which at the date of the contract he was at perfect liberty to use. It is true that the restriction is limited to twelve months, but during that twelve months the defendant is to be debarred from earning even weekly wages as a clerk in the business of his life.

It seems to me oppressive, and against the public interest, that employers, engaging at weekly wages servants who are already versed in the trade, should bind those servants not to take service in that trade with other masters, even though the restriction should be for only twelve months or some other limited time.

The case is obviously different from one in which the servant or apprentice merely binds himself for a limited time not to use in competition with his master knowledge acquired during his service under the contract containing the restrictive clause.

Moreover, the old rule that a covenant in restraint of trade without limit in space within the United Kingdom is unreasonable, or primâ facie unreasonable, unless some advantage to

the public can be found to counterbalance that which is primâ facie injurious to the public interest, is still, I believe, a rule to be followed. Generally, when there is a space limit, the advantage gained by those outside the limit may be set against the loss of the public within the limit.

In the present case I find nothing to the advantage of the public to counterbalance the disadvantage to the public of the restrictive covenant. The maintenance of the rules of fair dealing between man and man is not, in my opinion, sufficient in a case where the covenant is of such a character that the master ought not have required it of the person seeking employment, and I think that a covenant that the covenantor will not carry on, or enter into the service of those carrying on, that business in which his life previous to the engagement has been passed is of such a character.

Solicitors: *Hatchett-Jones & Co.; Ruston, Clark & Ruston.*

W. L. C.

NORTH J.
1898
Dec. 15.

In re BENNETT.
CLARKE *v.* WHITE.

[1898 B. 3015.]

Public-house—Mortgage—Goodwill of Business—Real Estate Charges Act, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113).

On August 12, 1871, a public-house, of which the mortgagor was the owner in fee, subject to a lease for thirty-one years from December 25, 1849, was mortgaged by him to secure 1507*l.* At this time the mortgagor was, as underlessee, occupying the house, and carrying on there the business of a licensed victualler. The goodwill of the business was not expressly included in the mortgage. On January 24, 1873, the original lease was surrendered to the mortgagor. He continued to carry on the business in the house until his death on November 20, 1873, and the business was afterwards carried on by the tenant for life under his will, until she died in 1897. The house and the goodwill were then sold by the trustee of the will (who had previously paid off the mortgage debt) for 11,550*l.*, of which 2617*l.* was apportioned as the value of the goodwill:—

Held, that, having regard to the existence of the lease, the goodwill did not pass to the mortgagee by the mortgage deed; that it did not accrue to him by the surrender of the lease; and that, as he had never taken possession, he had not acquired the goodwill de facto:

Held, therefore, that the mortgage debt must be borne by the residue of the purchase-money, after deducting the apportioned value of the goodwill.

Observations upon *Lewis* v. *Lewis*, (1871) L. R. 13 Eq. 218.

Summons to determine the question whether the plaintiff Caroline Clarke was entitled to receive out of the purchase-money of the Buck's Head Inn, at Mitcham, part of the estate of the testator G. W. Bennett, the sum of 2617*l.*, being the sum found by an arbitrator to be the value of the goodwill of the business of a licensed victualler carried on by the testator at the Buck's Head Inn, as on March 17, 1897, without any deduction therefrom on account of any part of a mortgage debt secured by a mortgage of the Buck's Head, dated August 12, 1871, and made between the testator, of the one part, and C. B. Rowland and J. G. Bracker, of the other part, to secure a sum of 1507*l.*, with interest thereon.

By a lease dated August 24, 1850, the Buck's Head was demised by James Smith and E. C. Williams to Francis New-

man for thirty-one years from December 25, 1849, at the yearly rent of 60*l*. The testator G. W. Bennett was at the date of his will in occupation of the Buck's Head as underlessee from Francis Newman, and carried on there the business of a licensed victualler. By his will dated April 12, 1869, G. W. Bennett bequeathed all his stock-in-trade, book debts, and the goodwill of his business at the Buck's Head, and all other his personal estate, to the defendant Cyrus White, upon trust for his mother Mary Ann Bennett during her life; and after her death upon trust for sale and conversion and division of the proceeds equally between Emma Bennett and the plaintiff Caroline Clarke (then Caroline Bennett); but in case either of them should die in his mother's lifetime, the testator bequeathed the same to the survivor of them. And the testator devised all his real estate unto and to the use of the defendant Cyrus White and his heirs, upon trust to permit Mary Ann Bennett to receive the rents and profits during her life, and after her death upon trust to sell the same and to divide the proceeds of sale unto and between his sisters Mary Ann Strachan (a defendant), Emma Bennett, the plaintiff, Henry Bennett (a defendant), and Charles Bennett in equal shares; and, in case any or either of them should die in the lifetime of Mary Ann Bennett, then the testator directed that the share or shares of the one or more of them so dying should go and belong to the survivor or survivors in equal shares, the shares of married women to be their separate property. And the testator appointed Emma Bennett, the plaintiff, and Cyrus White executrixes and executor of his will.

By a deed dated August 11, 1871, Samuel Potter and Henry Russell, the then owners in fee of the Buck's Head, in consideration of 1780*l*. conveyed the house to G. W. Bennett in fee, subject to the lease of August 24, 1850.

By a deed dated August 12, 1871, G. W. Bennett mortgaged the Buck's Head to C. B. Rowland and G. Bracker in fee to secure the repayment to them of the sum of 1507*l*. 6*s*. 9*d*., with interest thereon. This deed contained no reference to the goodwill of the business carried on at the Buck's Head.

By a deed dated January 24, 1873, Francis Newman surrendered the lease of August 24, 1850, to G. W. Bennett.

NORTH J. 1898 BENNETT. *In re.* CLARKE *v.* WHITE.

G. W. Bennett died on November 20, 1873. He had carried on the business until his death. After his death the business was carried on by the plaintiff and Emma Bennett until the death of the latter on September 18, 1879, and then until January, 1882, by the plaintiff, after which it was carried on by the plaintiff and her husband, until the sale of the house hereinafter mentioned, they paying a rent of 100*l.* a year to Mary Ann Bennett during her life. Charles Bennett died on January 7, 1895. Mary Ann Bennett died on April 10, 1897, and thereupon the plaintiff became absolutely entitled to the whole of the personal estate bequeathed by the testator, and the defendants Mary Ann Strachan and Henry Bennett became entitled in equal shares to the proceeds of the sale of the testator's real estate.

The mortgagees had never entered into possession of the mortgaged property.

In May, 1897, the defendant Cyrus White, as trustee of the will, paid off the mortgage debt, and obtained from the mortgagees a reconveyance of the Buck's Head to the uses of the will. The defendant Cyrus White afterwards sold the Buck's Head, including the goodwill of the business, for 11,550*l.*

On June 30, 1897, an action, *In re G. W. Bennett, White* v. *Strachan*, was commenced by originating summons by Cyrus White, asking for the determination of the question whether the proceeds of the sale of the goodwill of the business were to be treated or dealt with as part of the testator's personal estate or as part of his real estate; and asking also that, if necessary, an inquiry might be directed what sum had been received or was payable in respect of the goodwill on the sale of the business, together with the Buck's Head, for 11,550*l.* The defendants to that summons were Mary Ann Strachan, Caroline Clarke, and Henry Bennett.

On August 9, 1897, an order was made on that summons by consent of the parties, which contained a recital "and the defendants Mary Ann Strachan and Henry Bennett by their counsel admitting that the value (if any) of the goodwill of the business of the testator, as distinct from the value of the freehold, ought to be paid or accounted for to the defendant

Caroline Clarke," and directed a reference to a valuer named in the order "to fix the value of the goodwill on the basis aforesaid." And it was ordered that the sum so fixed as the value of the goodwill should be paid to Caroline Clarke, and that the residue of the proceeds of sale of the Buck's Head should be divided as proceeds of sale of real estate.

The present summons was taken out on July 8, 1898.

Method and *Rowden*, for the plaintiff. It may well be that the goodwill of a public-house is not a personal goodwill, but is incident to the house. Still it does not necessarily follow that the goodwill passes by a conveyance or mortgage of the house when the goodwill is not expressly mentioned in the deed: *Whitley* v. *Challis*. (1) If the mortgagee had sold under his power of sale, he could not have assigned the goodwill to the purchaser, for the mortgage was made subject to the lease. But the goodwill of a public-house is separable from the house, as is shewn by *West London Syndicate* v. *Inland Revenue Commissioners*. (2) The goodwill is not included in the mortgage here; and, consequently, the mortgage debt should be paid exclusively out of so much of the proceeds of sale as represents the value of the freehold apart from the goodwill.

W. M. Cann, for the defendants. If the goodwill was not comprised in the mortgage, it was not comprised in the conveyance to the purchaser in 1897. It is not expressly mentioned in either deed. But it is submitted that a mortgage of a public-house carries with it the goodwill of the business carried on in it. Such a goodwill is not personal, but attaches to the house. The mortgage was subject only to the lease to Newman, and that lease expired in 1880. On the expiration of that lease the goodwill attached to the freehold, and became an accretion to the mortgagee's security: *Chissum* v. *Dewes*. (3) Locke King's Act does not apply, for the proceeds of sale are not an interest in land within the meaning of that Act: *Lewis* v. *Lewis*. (4)

(1) [1892] 1 Ch. 64.
(2) [1898] 1 Q. B. 226; 2 Q. B. 507.
(3) (1828) 5 Russ. 29.
(4) L. R. 13 Eq. 218.

NORTH J.
1898
BENNETT, *In re.* CLARKE *v.* WHITE.

[*Method.* In that case the gift was of money arising from the sale of land under the trusts of a superior settlement.

NORTH J. There the mortgage was not upon the land, but upon a share of the proceeds of the sale of the land. In the present case the mortgage was upon the land itself.]

[This point was then waived.]

The goodwill is an advantage attaching to the possession of the house, and the mortgagees were entitled to take possession: *Booth* v. *Curtis* (1); *King* v. *Midland Ry. Co.* (2); *Pile* v. *Pile* (3); *Ex parte Punnett* (4); *Cooper* v. *Metropolitan Board of Works.* (5) *Whitley* v. *Challis* (6) is distinguishable from the present case. The judgment of Channell J. in *West London Syndicate* v. *Inland Revenue Commissioners* (7) is conclusive in favour of my argument.

Rowden, in reply. At the date of the mortgage the goodwill and the freehold of the house were severed, and, by reason of the lease to Newman, the goodwill could not pass to the mortgagees. There was no subsequent accruer to the interest of the mortgagees; they never had possession of the house, and never had any benefit from the goodwill. Of the cases referred to, *Whitley* v. *Challis* (6) is most like the present. There is no general rule that, as between a mortgagor and a mortgagee, the goodwill of a public-house passes to the mortgagee by a mortgage of the house. The trustees of the will paid off the mortgage debt, and the purchaser of the house did not derive the goodwill from the mortgagees.

F. L. Wright, for the trustee.

NORTH J. In my opinion the mortgage did not include the goodwill. [His Lordship stated the facts down to the death of the testator Bennett, and continued:—]

Down to this time Bennett had been in possession of the house; the mortgagees had never been in possession. After Bennett's death the house was from time to time let by the

(1) (1869) 17 W. R. 393.
(2) (1868) 17 W. R. 113.
(3) (1876) 3 Ch. D. 36.
(4) (1880) 16 Ch. D. 226.
(5) (1883) 25 Ch. D. 472.
(6) [1892] 1 Ch. 64.
(7) [1898] 1 Q. B. 238.

tenant for life and the trustees, and was ultimately let to a tenant for a term which expired on the death of the tenant for life in April, 1897. At that time the right of the reversioner became a right in possession. During the whole of that period down to April, 1897, the mortgagees had never been in possession of the property. The goodwill of the business was not conveyed to them in terms; and they never had had any de facto goodwill from being actually in the enjoyment of the property, and having the benefit of the customers coming to them by reason of their being known as carrying on the business on the premises. After the death of the testator the mortgage debt of 1507*l.* was paid off by the trustee of the will out of the testator's estate. Of course, that estate was liable to pay the mortgage debt, and Locke King's Act expressly provides that nothing contained in it shall affect any right of the mortgagee to receive full payment of his mortgage debt out of the personal estate of the mortgagor. Either because the mortgagees called in their money, or by reason of an arrangement between them and the trustee of the will, the mortgage debt was got rid of by its being paid out of the estate of Bennett. That, of course, cannot affect any question between the persons entitled to the personal estate and the persons entitled to the real estate of Bennett. Mr. Cann raised the point that Locke King's Act does not apply to the present case at all; but he afterwards waived that point, and it is not necessary for me to refer to it further than to say that the case of *Lewis* v. *Lewis* (1) was totally different from the present case. In the present case the mortgaged property belonged to the testator at his death, and the mortgage was then existing upon it. In *Lewis* v. *Lewis* (1) a prior settlement had directed that the property should be converted, and the proceeds of sale divided among three persons; and the will to which it was said Locke King's Act applied was not the instrument which directed the property to be converted. It was the will of a person who was entitled to one-third of the proceeds of sale as money, and by it he dealt with his share as money. It may well be that that testator's interest was not an interest in land

(1) L. R. 13 Eq. 218.

NORTH J. 1898 BENNETT, *In re.* CLARKE *v.* WHITE.

without its following that in the present case the testator's interest was not an interest in land. After the mortgage had been paid off the property was sold. It appears from the conveyance to the purchaser that the tenant for life and the trustees had agreed to sell it before the tenant for life died; but, she having died before the contract was completed, the trustees proceeded to complete it. It produced 11,550*l.*; and a question then arose between the devisees of the house and the legatee of the goodwill as to their respective interests in the purchase-money. That question they settled for themselves by means of an order, which, although it was nominally made by me, I could not have made without the consent of the parties, and it was expressly made upon the consent of their counsel. Nothing was decided by me, and the order embodied the agreement between them. [His Lordship read the order of August 9, 1897, and continued:—]

So that it was then settled by the agreement of the parties to the order that whatever value might attach to the goodwill was separable from the property itself, and was payable to the plaintiff Caroline Clarke. The valuers valued the goodwill at 2617*l.*, and it follows that that sum ought to be paid to the plaintiff.

But then a point is raised by the present summons which I fully admit is not precluded by that order. That order settles that the assessed value of the goodwill belongs to the plaintiff; but the question is left open in what way the money paid by the trustee out of the testator's personal estate in discharge of the mortgage debt is to be made good. It must be made good out of the property mortgaged, and the question is, whether the house only was comprised in the mortgage, or whether the goodwill was also included. As I have already pointed out, when the house was mortgaged no goodwill was in terms vested in the mortgagees; and from that time onwards there has never been any reference in the documents to the goodwill as property conveyed or mortgaged, and there has never been any de facto acquisition of the goodwill by reason of the occupation of the house by the mortgagees. They never entered into possession; the possession was in the

mortgagor at first, and after his death in the persons who claimed under him. Under these circumstances I cannot find anything to shew that the goodwill ever passed to the mortgagees. It did not pass to them by the original mortgage, and there is no subsequent deed by which it passed to them. It is suggested that it passed to them by some right of accruer when the lease granted in 1850 expired in 1880. In my opinion it did not. The cases upon which Mr. Cann relied seem to me not to apply. When the goodwill of a house is conveyed to a man, or when he enters into possession and so obtains the goodwill, the goodwill may then pass to his mortgagees as an incident to the house without there being any reference to it in the mortgage. In the present case I do not see that the goodwill was conveyed to or became in any other way vested in the mortgagees. This being so, I think the mortgage debt must be borne by the property comprised in the mortgage; and in my opinion that does not include so much of the proceeds of sale as represents the value of the goodwill.

Solicitors: *Peacock & Goddard, for Rowland & Hutchinson, Croydon; F. G. Evan Jones.*

W. L. C.

NORTH J.
1898
Dec. 20. 21.

In re CARNE'S SETTLED ESTATES.

[1898 C. 2574.]

Settled Land—Tenant for Life—Trust to allow A. to Occupy a Mansion-house and Land so long as she might wish to do so—Trustees for Purposes of Settled Land Act—Trustees of Term with Power to Raise Money by Mortgage or otherwise—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 3, 5, 8, 10 (*i.*); *s.* 38, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*vi.*).

By a settlement a mansion-house and lands were (subject to a rent-charge) vested in trustees for a term of 1000 years, upon trust in the first place to allow the plaintiff to occupy the mansion-house and certain specified lands, rent free, for so long as she might wish to continue to do so. And upon further trust, by mortgage thereof, or by or out of the rents and profits thereof, or by any other reasonable ways or means, to raise some specified sums of money, and, subject to the term, to the use of one of the defendants in fee:—

Held, on the authority of *In re Eastman's Settled Estates*, W. N. (1898) 170 (15), that the plaintiff was tenant for life, within the meaning of the Settled Land Act, 1882, of the mansion-house and lands which she was to be allowed to occupy, and could in respect of them exercise the powers conferred by the Act upon a tenant for life:

Held, also, that the trustees of the term were not trustees for the purposes of the Act, but that trustees for those purposes must be appointed.

SUMMONS by Mary S. Stradling Carne, widow, as plaintiff, asking (1.) that it might be determined whether she was tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, under a settlement, dated March 14, 1890, of a mansion-house called St. Donat's Castle, with the pleasure grounds, gardens, stables, coach-houses, and appurtenances belonging thereto, and also of six fields referred to in the same settlement, and whether she was entitled to exercise in respect of the said hereditaments the powers conferred upon a tenant for life by the Settled Land Acts; (2.) whether the plaintiff and Matthew Peake were trustees of the said hereditaments within the meaning of the said Acts; (3.) that if necessary trustees might be appointed of the said hereditaments for the purposes of the said Acts.

The defendants to the summons were Matthew Peake and John Devereux Van Loder Nicholl Carne.

By the settlement dated March 14, 1890 (which was a voluntary one), Mansel Nicholl Carne, as settlor, conveyed to the defendant John D. Van L. Nicholl Carne and his heirs (inter alia) the castle and the manor of St. Donat's, in the county of Glamorgan, with all and every of their rights, members, and appurtenances, and certain messuages, tenements, and hereditaments specified in the 3rd schedule to the deed and delineated in a plan thereto annexed, to hold the same unto the said John D. Van L. Nicholl Carne and his heirs to the use and intent that the plaintiff might thenceforth during her life receive a yearly rent-charge of 50*l.* to be issuing out of the said premises; and, subject to and charged with the said rent-charge, to the use of the plaintiff and John Stockwood, their executors, administrators, and assigns, for the term of 1000 years from the date of the deed, upon the trusts thereinafter declared concerning the same; and from and after the determination of the term, and in the meantime subject thereto and to the trusts thereof, to the use of John D. Van L. Nicholl Carne, his heirs and assigns, for ever. And it was thereby agreed and declared that the plaintiff and the said John Stockwood, their executors, administrators, and assigns, should stand possessed of the premises comprised in the term, upon trust in the first place to allow the plaintiff to occupy St. Donat's Castle, with the pleasure grounds, garden, stables, coach-houses and appurtenances belonging thereto, and also six specified fields, rent free for as long as she might wish to continue to do so. And upon further trust that the trustees should out of the rents and profits of the said premises or by any other reasonable ways or means raise and pay certain succession duty, and keep the settlor indemnified therefrom, and also that the trustees should by mortgage of the said premises, or by or out of the rents and profits thereof, or by any other reasonable ways and means, raise and pay two sums of 680*l.* and 40,000*l.* and all interest thereon. The deed contained a covenant by Mansel Nicholl Carne with the plaintiff and also with John D. Van L. Nicholl Carne that he the said Mansel Nicholl Carne

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would permit the plaintiff so long as she should choose to live at St. Donat's Castle to use and enjoy all the plate, furniture, and effects in and about or belonging to or appropriated for St. Donat's Castle, and the stables, coach-houses, outbuildings, and pleasure grounds thereto belonging, but so that she should not be at liberty to remove the same or any of them.

The plaintiff made an affidavit in which she said that, if it should be held that she was entitled to exercise the powers of a tenant for life in respect of the property mentioned in the summons, she desired to let the same during the residue of her life, and to receive the rents for her own use; but, if it should be held that she was not so entitled, she desired to occupy the whole of the said premises.

Mansel Nicholl Carne and John Stockwood were both dead. The defendant Matthew Peake had been appointed a trustee of the term of 1000 years in the place of John Stockwood.

H. Terrell, Q.C., and *W. M. Cann*, for the plaintiff. (1.) The plaintiff is a tenant for life within the meaning of the Settled Land Act, 1882, or, at any rate, she is a person entitled to exercise the powers of a tenant for life. She comes within the definition of "tenant for life" contained in sub-s. 5 of s. 2 (1)

(1) Sect. 2: "(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

"(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land."

"(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

"(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to

of the Act. She is "for the time being beneficially entitled to possession of settled land for her life." This voluntary settlement is a "settlement" within sub-s. 1, and the land comprised in it is "settled land" within sub-s. 3. At any rate, if sub-s. 5 does not apply, the plaintiff has the powers of a tenant for life under s. 58, sub-s. 1 (vi.).

In re Paget's Settled Estates (1) is in favour of the plaintiff. So also is *In re Edwards' Settlement.* (2) In that case the lady to whom the option of personally occupying a house was given during her life or widowhood was not in the personal occupation of the house. Here the plaintiff is and always has been in the personal occupation of the property. The decision of Romer J. in *In re Eastman's Settled Estates* (3) is precisely in point. By s. 2, sub-s. 10 (i.), "possession includes receipt of

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be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement."

"(10.) In this Act

"(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income."

Sect. 6: "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

"(i.) In case of a building lease, 99 years:

"(ii.) In case of a mining lease, 60 years:

"(iii.) In case of any other lease, 21 years."

Sect. 38: "(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act."

Sect. 58: "(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely)" inter alia:

"(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose."

(1) (1885) 30 Ch. D. 161.

(2) [1897] 2 Ch. 412.

(3) W. N. (1898) 170 (15).

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income." The power given to the trustees to raise money by mortgage or other ways includes a power of sale: *Tasker* v. *Small.* (1) The premises comprised in the term are "settled land" within s. 2, sub-s. 3, of the Act, and the trustees of the term are trustees for the purposes of the Act within s. 2, sub-s. 8.

Vernon Smith, Q.C., and *J. G. Wood*, for the reversioner. The plaintiff is neither a tenant for life within the meaning of the Act, nor is she entitled to exercise the powers thereby conferred on a tenant for life. She is not "beneficially entitled to possession" of the land for her life; she has only a right to occupy it as long as she pleases to do so. Sect. 2, sub-s. 5, does not include a determinable interest. Sect. 58, sub-s. 1 (vi.), does not apply. The plaintiff has no estate at all; she has merely a right of personal occupation. *In re Edwards' Settlement* (2) is an authority against the plaintiff. There was there something more than a mere right of personal occupation. There was an express gift for life with a condition cutting it down. It was an estate for life determinable. In the present case the very object of the settlor would be defeated if the plaintiff could take the benefit of the mansion-house and lands without personally occupying them: *In re Paget's Settled Estates* (3) was also a different case. The ground of the decision was that s. 51 applied. The Court will not strain the Act, or extend it by a forced or artificial construction: *In re Hazle's Settled Estates.* (4) If the plaintiff is a tenant for life or can exercise the powers conferred on a tenant for life, she can either lease, or sell the mansion-house, and the reversioner might be deprived of the house which the settlor intended him to have. In *In re Paget's Settled Estates* (3) the person who was held to have the powers of a tenant for life was entitled to the rents and profits of the estate. That is not so here. If the plaintiff should let the mansion-house and lease it, who would be entitled to the furniture?

The power of the trustees to mortgage does not extend beyond the term.

(1) (1834) 6 Sim. 625.
(2) [1897] 2 Ch. 412.
(3) 30 Ch. D. 161.
(4) (1885) 29 Ch. D. 78, 83.

H. Terrell, Q.C., in reply. The plaintiff has an estate for life determinable. The possession of the furniture was intended to coincide with that of the house.

NORTH J. I do not see how I can escape from the decision of Romer J. in *In re Eastman's Settled Estates*. (1) No attempt has been made to distinguish that case from the present, and I do not see any way of doing so. The case is reported only in the *Weekly Notes*, but the language as given seems to be that of the will, and I must take it that it is. The testator there gave his leasehold house to trustees, upon trust to permit his widow to occupy the same, and out of his residuary estate to pay her during widowhood an annuity so long as she continued to reside in the house. It was held by Romer J. that the widow was tenant for life of the house within the meaning of the Settled Land Acts. I cannot see any distinction between that case and the present so far as the limitation goes. I find that the old authorities say clearly that a gift of such an interest as this amounts to a gift of an estate for life. It is said in Co. Litt. 42 a, "If a man grant an estate to a woman dum sola fuit, or durante viduitate, or quamdiu se bene gesserit, or to a man and woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay 10*l.*, &c., or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as Bracton saith, is tempus indeterminatum: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall alledge the lease, and conclude, that by force thereof he was seised generally for terme of his life."

Again, in Burton's Real Property, 7th ed. p. 239, pl. 725, I find this: "An estate to a widow during her widowhood, or to any person as long as he shall dwell in such a house, or till he be promoted to a benefice, is a freehold, confined to an uncertain period included in the party's life."

(1) W. N. (1898) 170 (15).

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I think the words of this settlement must be construed in the same way. I quite appreciate the position of the parties. It may be that the mansion-house with the land surrounding it could be sold, and the rest of the settled estate left, with this island the property of some one else in the middle of it. That this would be contrary to the intention of the settlor goes without saying. But the intention of the settlor does not much matter. The question is, what does the Act say? It was certainly intended to give to tenants for life, and to persons who are treated by the Act as being in the position of a tenant for life, power to do that which without the Act they clearly could not do—in fact, to do that which would clearly defeat the express intention of persons who had made previous dispositions of the property. Here it is now proposed only to grant a lease; but a sale would be equally within the powers of the Act, and the result might be, as I have already said, that this part of the settled property might be sold away. And I see that the property referred to is the mansion-house, the pleasure grounds, gardens, stable, coach-house and appurtenances belonging thereto, and also six fields adjoining. It may be that these are part of the surroundings of the mansion-house, and that they cannot be sold without the consent of the trustees; but, unless that is so, the applicant could sell them without any consent whatsoever. That, however, is what the Act says, and I do not see my way to put any other construction upon the settlement than that which was adopted by Romer J. in the case to which I have referred.

In my opinion the trustees of the term are not trustees for the purposes of the Act. There must be a reference to chambers to appoint trustees.

Solicitors: *George Terrell; Field, Roscoe & Co., for W. H. Lewis, Cardiff.*

W. L. C.

NORTH J.
1899
Jan. 25.

In re SMITH.
GROSE-SMITH *v.* BRIDGER.

[1898 S. 4302.]

Settled Land—Fetter on Power of Sale—Settled Land Act, 1882 (45 & 46 *Vict.* *c.* 38), *s.* 51.

A testator settled real estate. His widow died in 1869, having bequeathed personal estate to be held on trust for the person entitled to the enjoyment of the settled real estate, with a proviso that in case of sale of the real estate, either during the life of a person then in being, or within twenty-one years from her death, her trust property should go over:—

Held, that in case of sale of the real estate under the Settled Land Acts the gift over was ineffectual.

HENLEY SMITH died in January, 1867, having devised an estate called the Priory estate in the Isle of Wight on trust for his wife Elizabeth for life, and after her death by sale or mortgage to raise portions for his daughters, and subject to the prior trusts on trust for his son Henley Grose Grose-Smith, the plaintiff in the summons, and after his death on trust for his first and other sons in tail male, with remainders over. The will contained a power of sale with the consent of the tenant for life or tenant in tail in possession.

The testator's wife Elizabeth Smith died in July, 1869, having made a will by which she devised and bequeathed her residuary real and personal estate on trust for sale and conversion and reinvestment, and upon trust to accumulate the income for a period not exceeding twenty-one years, with a proviso for the cesser of the trust for accumulation in the event of the sale of the Priory estate, except outlying parts by way of accommodation to adjoining property. In case of failure of the trust for accumulation by reason of a sale, she gave the accumulated fund over. Subject to the aforesaid trusts, the testatrix declared that her residuary trust estate should be held in trust for the person or persons who, under the will of her late husband, should for the time being be entitled to the ownership and enjoyment of the Priory estate, and as though

NORTH J. 1899 SMITH. *In re.* GROSE-SMITH *v.* BRIDGER.

the same had been by that her will directed to be laid out in the purchase of lands to be settled to the uses of the will of her said late husband; and the testatrix declared that, in case either during the lifetime of any person then in being who had any estate or interest in the Priory estate under her husband's will or within twenty-one years from her death, the Priory estate or any portion thereof (other than such portions as for accommodation purposes as aforesaid it might be expedient to sell or exchange) should be sold, her trustees should thenceforth stand possessed of her residuary trust premises in trust for Charles Heathfield Dodgson (in the said will called Charles Dodgson), his executors, administrators, and assigns absolutely. But the testatrix expressly declared that that proviso should not take effect in case any such sale should be made by a mortgagee of the said estate. And the testatrix empowered her trustees, if and whilst the Priory estate should remain subject to the limitations of her said husband's will, to advance the funds subject to the trusts of her will (other than the accumulated fund) for the purpose of taking transfers of mortgages on such estate without liability for loss consequential thereon, it being her desire to prevent by all reasonable means the sale of the Priory estate so far as possible in accordance with the known wishes of her late husband.

This was an originating summons, in which the tenant for life of the Priory estate was plaintiff, to determine whether, in case of a sale under the powers of a tenant for life conferred by the Settled Land Acts of a portion of the Priory estates, the gift over to Charles Heathfield Dodgson, contained in the codicil of Elizabeth Smith, took effect or was void under s. 51 of the Settled Land Act, 1882. The defendants were trustees and the executors of Charles Heathfield Dodgson.

Carson, for the tenant for life. The forfeiture clause and gift over created by the will of the testatrix, in case of sale of the land settled by her husband, is void in case of a sale under the Settled Land Act, though she died before the passing of the Act, and the fetter she attempted to impose was on land settled by another person. The case is within the clear

language of s. 51 of the Act: *In re Ames* (1); *In re Paget's Settled Estates.* (2)

Dibdin, for the trustees, mentioned the case of *In re Eastman's Settled Estates.* (3)

Daniel Jones, for the executors of C. H. Dodgson. Sect. 51 is only intended to apply to a case where a fetter on sale is imposed by the settlor of the property to be sold. *In re Ames* (1) related to a will and codicil which are really the same instrument. It is a strong thing to say that a different person altogether may not deal as he chooses with totally different property. In this case the settlements were made before the Act, and it is a strong thing for the Legislature to alter the existing rights of persons and take away a valuable chance of obtaining a benefit.

NORTH J. I do not see my way out of the decision to which Mr. Carson asked me to come. It is quite true that the settlements by both the settlors in the present case were made in 1866 and 1869 respectively, long before the Settled Land Act of 1882—I will not say was thought of, but at any rate before it had come into existence, and when the settlors may well be taken not to have expected legislation of the sort. At the time those instruments were prepared, the law allowed a man to tie up land during the life of a tenant for life. Sometimes a settlor gave a tenant for life a power of sale; sometimes such power of sale was given with limitations; and frequently a tenant for life had no power of sale, and so long as an estate was held by a tenant for life, and there was no power of sale, that estate was not alienable. The Legislature, however, considered that the then state of the law in this respect was a public disadvantage, and ought to be altered. For the purpose of accomplishing that object, the power to sell has been given to tenants for life by statute, and as it would have been of no use to give that power by the hand of the Legislature, if it were allowed to be inferentially taken away by the hand of a private person, the Legislature not only

(1) [1893] 2 Ch. 479. (2) (1885) 30 Ch. D. 161.
(3) W. N. (1898) 170 (15); 43 Sol. J. 114.

NORTH J. 1899 SMITH, *In re.* GROSE-SMITH *v.* BRIDGER.

gave the power of sale, but went the length of framing what I concur with Mr. Daniel Jones in thinking is a very strong provision, and provided that if any attempt was made to induce a tenant for life not to sell, or any benefit was attempted to be taken away from him on a sale taking place, such attempt was to be ineffectual, and he was to be in the position of having the same interest as he would have had if the sale had not taken place. I think the present case is within the enactment.

The provision in the will of Elizabeth Smith is just such a provision as a person who had read the Act, and knew what was intended, namely, to give a power of sale to every tenant for life, would have made to prevent a sale, if the sale could be prevented. I cannot doubt that this provision was inserted to induce the tenant for life not to exercise the power of sale: which the will itself states it was the desire of the testatrix to prevent. It is said it is contained in the settlement made by a person who was not the settlor of the estate to be sold, and it is suggested that that makes a difference. I do not quite see, on principle, how it makes any difference; and if it does make a difference, I certainly do not think it tends to shew that the Act ought not to apply to such a case; because it might come to this—that a settlement being made by a settlor giving the tenant for life the power to sell, some other person might interfere to divert the property from being sold as was intended, and to prevent the powers given by the law being capable of effectual exercise. I think the words of the section are too strong. It is not confined to anything done by the settlement under which the tenancy for life is created. [His Lordship read the words of the section, and continued :—]

I do not see anything in the words to the effect that such a provision as is aimed at is to be contained in the instrument or instruments by which the settlement is effected. The object of the enactment cannot be defeated by the use of two deeds instead of one; it would be idle to provide that a settlor settling land on a tenant for life could not interfere with his power of sale by anything contained in the same instrument, if it was open to him to make another collateral settlement at

the same moment, and insert therein a provision which would cast such a burthen on the tenant for life on the sale of the land as practically to put a veto upon the sale. I cannot for a moment think that the section can be defeated simply by allowing the settlor to split a settlement into two, and defeat the object of the Legislature partly by one deed and partly by another. I do not see why the Act should not equally apply to a case in which a father settles land, and the mother settles her estate to the same uses upon condition that the land shall not be sold.

Then it is further said, it is strange that the Act should alter settlements made by settlors long before the Act of Parliament was passed. There, again, I think the words of the Act are too strong. It says, "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act," and so on; so that the case has been thought out. The more frequent case for the Act to apply will be where the settlement has been made after the Act; but the section is to apply also where the settlement is made before the Act; and the Legislature has gone further, and said there may be another case, namely, where it is partly before and partly after, and it is to apply to that as well. The words are too strong for me to say that the section does not apply to the present case because the instrument was made before the passing of the Act.

Solicitors: *Lingard; Nicol, Son & Jones; Bridges, Sawtell & Co.*

D. P.

STIRLING J.

1898

Nov. 12;
Dec. 15.

In re DREW.
DREW *v.* DREW.

[1898 D. 1157.]

Will—Construction—Gift to a Son and his Wife and Children in Succession—Remarriage of Son after Date of Will.

A testator devised and bequeathed a share of his residuary estate upon trust to pay the income thereof to his son B. for life, and after his decease to B.'s wife for life, and after her decease upon trust as to both income and corpus for B.'s children living at B.'s decease; and the will provided for the cesser of B.'s interest upon alienation or bankruptcy, in which event the trustees were to apply the income of the share thereinbefore directed to be invested for B. "and his family" towards the maintenance of B., "his wife and children." B. had a wife living at the date of the will; but she afterwards died, and he married a second wife, who survived him:—

Held, that there was sufficient context in the will to rebut the presumption that the gift to B.'s wife for life was confined to the wife living at the date of the will, and that the widow was entitled.

George Drew, by his will dated December 7, 1859, devised and bequeathed all the residue of his real and personal estate to trustees upon trust (inter alia) that they should for a period of sixteen years next after his decease divide half-yearly the surplus rents and profits and income thereof into thirteen equal parts or shares, to be paid to his children as therein mentioned, and in particular he directed one thirteenth part to be paid to his son Beriah Harvey Drew for so many years of the said term of sixteen years as he should live, and after his death "to his wife" during the remainder of the said term in case she should so long live for her separate use, and after her death to the children of his said son Beriah Harvey Drew who should be living at his (the son's) decease during the remainder of the said term if they should so long live; and the testator further directed that, after the expiration of the said term of sixteen years, the trustees should sell and convert the residuary trust estate and stand possessed of the net moneys arising from such sale and conversion upon trust as to twelve thirteenth parts thereof as therein mentioned, and upon trust as to the remain-

ing one-thirteenth part thereof to invest the same as therein mentioned, and to pay the annual income to his son Beriah Harvey Drew for his life, and after his decease "unto the wife of my said son for and during her natural life for her separate inalienable use and from and after her decease upon trust to pay such interest dividends and income to the lawful child or children of my said son Beriah Harvey Drew who shall be living at his decease and who shall live to attain the age of twenty-one years," and upon trust to divide the capital among such children upon their attaining the age of twenty-one years share and share alike, with a gift over to the other children of the testator in case there should be no child of his said son living at his (the son's) decease who should live to attain that age.

The will contained a proviso for the determination of the son's interest under the above-mentioned provisions for his benefit in the event of alienation or bankruptcy, and it then proceeded as follows: "and after the determination of the interest so given or intended for my said son Beriah Harvey Drew Upon trust that the said trustees or trustee for the time being do and shall retain and keep in their own hands the share of and in the said surplus rents and profits interest dividends and income and the interest dividends and income of the thirteenth part or share hereinbefore directed to be invested for my said son Beriah Harvey Drew and his family and every part thereof for the purpose of applying the same in or towards the maintenance and support of my said son Beriah Harvey Drew his wife and children at such time or times and in such manner and in such proportions as the said trustees or trustee shall in their or his entire discretion think fit," or in paying the same to the testator's other children or their issue.

The testator died on October 22, 1862.

At the dates of the will and of the testator's death Beriah Harvey Drew and Maria his wife, to whom he was married in 1850, were both living. Maria Drew died on July 11, 1889. On April 5, 1890, Beriah Harvey Drew married again, and he died on February 16, 1898, leaving Sarah Ann Drew, his widow, him surviving.

On July 7, 1898, the present trustees of the will took out an

STIRLING J. originating summons against the several parties interested in the one-thirteenth share of the testator's residuary estate above referred to, to determine the question whether upon the true construction of the will the income of the share in question became payable on the death of Beriah Harvey Drew to his widow.

1898

DREW, *In re.* DREW *v.* DREW.

E. J. Payne, for the summons.

S. Dickinson, for the defendants other than the widow. The word "wife" in this will is limited to the wife living at the date of the will, in accordance with the rule that a gift to the wife of a named person who has a wife living at the date of the will is, in the absence of any context to the contrary, a gift to that wife, and to that wife only: 1 Jarman on Wills, 5th ed. p. 303; Theobald on Wills, 4th ed. p. 229; *Boreham* v. *Bignall* (1); *Radford* v. *Willis* (2); *Re Burrow's Trusts* (3); *Firth* v. *Fielden*. (4) There is here no sufficient context to take the case out of the general rule.

Stewart-Smith, for the widow. I rely upon two circumstances as taking this case out of the general rule. In the first place, the corpus of the share is given to all the children of Beriah living at his death. That includes the children of any wife. Secondly, in the cesser clause the objects of the original gift are described as "Beriah and his family," which would include any wife no less than the children of any wife, and the trustees are directed to apply the trust funds towards the maintenance of Beriah, "his wife and children." That must mean wife for the time being. These circumstances shew that the intention was to provide for any wife of the son, as well as for the children of any wife, living at the time of his death: *In re Lyne's Trust* (5); *Longworth* v. *Bellamy*. (6)

Dickinson, in reply. The first circumstance relied upon to take the case out of the rule occurred in *Re Burrow's Trusts*. (3) With regard to the second, it does not follow that because the testator in the case of the son's bankruptcy intended to provide

(1) (1850) 8 Hare, 131.
(2) (1871) L. R. 7 Ch. 7.
(3) (1864) 10 L. T. 184.
(4) (1874) 22 W. R. 622.
(5) (1869) L. R. 8 Eq. 65.
(6) (1871) 40 L. J. (Ch.) 513.

for any wife during the lifetime of the son (if that is the meaning of the cesser clause, which I dispute) he meant the same thing in the original gift. The effect of that would be to give a contingent operation to that which is in terms an absolute gift to the son's wife. *In re Lyne's Trust* (1) is distinguishable, because there the wife and the children were members of a class which was to be ascertained at the death of the husband. Moreover, *Re Burrow's Trusts* (2) was not there cited.

STIRLING J. This is a case which is not very satisfactory to decide, having regard either to the state of the authorities or to the general principles on which the case ought to be decided. It turns upon the question what person was intended by the testator when he spoke of the wife of one of his sons to whom he gave an interest in a share of his property. [His Lordship referred to the will, and continued as follows :—] The testator speaks throughout of the wife of Beriah Harvey Drew. Beriah Harvey Drew had a wife living at the date of the will. She was also living at the death of the testator, but died some time afterwards. Subsequently to her death Beriah Harvey Drew married again, and he is now dead, leaving his second wife him surviving. The question is whether under the language of this will the widow is entitled to the income of the share in question.

As regards the rule of law, the proposition which is admitted in this case is that primâ facie where the wife of a person is spoken of by a testator and that person is married at the date of the will, in the absence of any context, the wife existing at the date of the will is the person intended to take. That proposition has not been disputed by the learned counsel who argued this case. The sole question which I have to consider, therefore, is whether there is a sufficient context in this will to take the case out of the general rule which I have just stated. Two circumstances are relied upon : first, that the gift to the children of Beriah Harvey Drew necessarily includes the children by any wife, because they are described as "his children," and the class is limited to those of them who are living at the time

(1) L. R. 8 Eq. 65. (2) 10 L. T. 184.

STIRLING J. 1898 DREW, *In re.* DREW *v.* DREW.

of his death. Upon that it is said that, as the children who are intended to be benefited are the children by any wife, it is somewhat extraordinary that the wife who is intended to take an interest only if she survives should not be a person who is also living at that time. The second ground upon which it is contended that there is such a context is that, in the clause which provides for the destination of the income of the share in question in the event of alienation or bankruptcy on the part of Beriah Harvey Drew, his wife and children are to be the objects of the discretionary trust; and I think it was hardly argued that in that particular clause the wife who was intended was not to be a second wife; but it was said that that clause did not throw light on the previous gift in the will, and that its operation only extended to the application during the life of Beriah Harvey Drew of the income which would otherwise have come to him. These are the circumstances which I have to consider.

As regards authority, the matter stands in a somewhat peculiar position. The two cases which have been relied upon by Mr. Dickinson, *Radford* v. *Willis* (1) and *Firth* v. *Fielden* (2), appear to me to establish the proposition with which we start and which is not disputed. Then, as regards the effect of the first of the two elements which I have to deal with in the present case, namely, that the gift is to the children of Beriah Harvey Drew, meaning all the children whether by a first, second, or any subsequent wife, the authorities seem to be somewhat conflicting. On the one hand, in *Re Burrow's Trusts* (3), where there was a gift to the testator's brother William Burrow, and after his death to his children, followed by a direction that if the wife of his brother should survive her husband she should receive the rents, interest, and profits arising from the property given to the brother and his children for her life, Kindersley V.-C. held that the wife there meant was not the second wife. On the other hand, in the case of *In re Lyne's Trust* (4) before Malins V.-C. (in which unfortunately the decision in *Re Burrow's Trusts* (3) was not called to the Vice-

(1) L. R. 7 Ch. 7.
(2) 22 W. R. 622.
(3) 10 L. T. 184.
(4) L. R. 8 Eq. 65.

Chancellor's attention), where a testator gave 800*l.* to trustees to pay the dividends to his son for life, and after his decease to divide the capital between and amongst the wife of his son (in case she should survive him) and the children of the son upon their attaining twenty-one, and there was a wife living at the date of the will who afterwards died and the son married again, it was held that the gift was to a class consisting of all the children of the son and any wife who survived him.

As regards the effect of the second of the two elements, two authorities have been cited, neither of them perhaps very directly in point: one being the case of *Longworth* v. *Bellamy* (1), in which there was a direction that in case of the bankruptcy of any legatees the trustees should apply the income for the benefit of the wife and children, putting it shortly, and it was held that that included a second wife. That case is open to the observation that there were there some legatees who were unmarried. The other case is the old case of *Boreham* v. *Bignall* (2), in which, upon a specially worded clause, Wigram V.-C., as he says with regret, came to the conclusion that the gift did not extend to a second wife; but, as I read his judgment, had it not been for the special circumstances which are there mentioned, he would have come to a different conclusion.

I have to apply the rule to the case before me, and to say what is the effect upon my mind of the two elements which I have had to consider. The effect upon my mind is that the testator meant any wife of the son. Whether, in the conflicting state of the authorities, I should have come to that conclusion upon the first of the two elements, if it had stood alone, it is needless for me to say; but I do rely upon the mode in which the testator provides that the income is to be dealt with during the lifetime of Beriah Harvey Drew in the case of alienation by him. It is to be applied in or towards the support and maintenance of "Beriah Harvey Drew, his wife and children." I think that there the testator clearly means "any wife." I cannot believe that it was the intention of the testator that, though the children of the second wife were to be provided for,

(1) 40 L. J. (Ch.) 513. (2) 8 Hare, 131.

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the second wife herself was not to have a share if the trustees thought fit.

Then what light does that throw upon the construction of the prior part of the will? The testator, in specifying the subject-matter with which he is there dealing, speaks of the rents and income of the one-thirteenth part "hereinbefore directed to be invested for my said son Beriah Harvey Drew and his family." "Family" there is used in a wide sense, and would naturally include, I think, any wife of Beriah Harvey Drew for the time being; and that is shewn by the direction which follows—that the income is to be applicable for the maintenance and support of the son Beriah Harvey Drew, his wife and children. Looking at the whole of the will, I think that there is here a sufficient context to take the case out of the general rule. I think, therefore, that the widow is entitled during her life. The costs will come out of the capital of the one-thirteenth share.

Solicitors: *Wilkinson & Son; Alexander Pope.*

H. B. H.

WOOLF *v.* WOOLF.

KEKEWICH J.

1898

Dec. 16.

[1898 W. 3547.]

Practice—Infant—Jurisdiction—Infant Defendant ordered to pay Costs.

Where an injunction was granted to restrain an infant defendant from representing that the business carried on by him was connected with the business carried on by the plaintiff:—

Held, that the Court had jurisdiction to order the infant defendant to pay the costs of the action.

Chubb v. *Griffiths*, (1865) 35 Beav. 127, and *Lemprière* v. *Lange*, (1879) 12 Ch. D. 675, followed.

THIS was an action by a plaintiff against an infant defendant in which the plaintiff moved the Court, asking by his notice of motion that an interim injunction might be granted restraining the defendant "from carrying on or advertising or holding out that he is carrying on the trade or business of a tailor and outfitter under the style or firm name of Woolf Brothers or in any manner representing or inducing the public to believe that the business carried on by the defendant is carried on by the plaintiff or in any way connected with the business of the plaintiff."

It appeared that the plaintiff was carrying on business as a tailor under the style or firm name of Woolf Brothers, and it was alleged by the plaintiff that the defendant was carrying on a similar business under the same style or firm name in such a manner as to mislead the public as above stated to the injury and detriment of the plaintiff.

On the motion coming on for hearing on November 25, 1898, before Kekewich J., his Lordship, after argument, expressed his intention of granting an injunction, and the motion was thereupon by consent of the parties treated as a motion for judgment, and the defendant submitted to a perpetual injunction being granted against him.

Some discussion then took place as to the jurisdiction of the Court to order the infant defendant to pay costs; but, on the

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case of *Chubb* v. *Griffiths* (1) being cited, his Lordship was of opinion that he had jurisdiction, and made the order accordingly.

An order was then drawn up whereby, "the plaintiff and defendant consenting to treat the motion as a motion for judgment," the Court ordered that the defendant be perpetually restrained in terms of the notice of motion, and the draft order concluded as follows: "and it is ordered that the defendant Joseph Woolf, sued as Mr. Woolf trading as Woolf Brothers, do pay to the plaintiff Maurice Woolf trading as Woolf Brothers his costs of this action to be taxed by the taxing master."

The registrar (Mr. Jackson) on the drawing up of the order referred to the record in *Chubb* v. *Griffiths* (1) entered in Reg. Lib. 1865 A, fo. 2417, and ascertained that there was nothing in the pleadings in that action to shew that the defendant was an infant. He accordingly desired that the matter should be again mentioned to the Court before the order was finally drawn up.

Waggett (*Warrington*, *Q.C.*, with him), for the plaintiff. We ask that the order may go as it has been drawn up. *Chubb* v. *Griffiths* (1) is a clear authority upon the subject, and is so treated in the text-books: see Simpson on Infants, 2nd ed. pp. 103, 498. At p. 103 it is said that an infant "may be restrained (with costs) from selling spurious articles, represented by him to have been manufactured by the plaintiff."

In *Chubb* v. *Griffiths* (1) the Master of the Rolls does not appear to have entertained any doubt as to the practice, and expressed himself as deciding the case on the principle of *Cory* v. *Gertcken*. (2) Moreover, *Chubb* v. *Griffiths* (1) does not stand alone. In *Lemprière* v. *Lange* (3) an infant obtained a lease of a furnished house on an implied representation that he was of full age, and Sir George Jessel declared the lease void, ordered possession to be given, restrained the defendant from parting with the furniture, and expressly ordered the infant defendant

(1) 35 Beav. 127. (2) (1816) 2 Madd. 40.
(3) 12 Ch. D. 675.

to pay the costs of the action. Upon principle the point seems to be clear. An infant is liable in damages for a tort, and the costs of the action are in effect part of the damages.

A. H. Dennis, for the defendant. Unless *Lemprière* v. *Lange* (1) is to be regarded as an authority, there is no case in which an infant, in the absence of fraud, has been ordered to pay costs. *Chubb* v. *Griffiths* (2) was treated by the Master of the Rolls as depending on fraud, and he based his decision upon *Cory* v. *Gertcken* (3), which was clearly a case of fraud on the part of an infant in obtaining, by a false representation that he was of full age, a transfer of stock from trustees. I do not dispute that an infant is liable for tort in damages; but costs are a penalty by reason of a person being engaged in legal proceedings, and an infant cannot be engaged in legal proceedings. *Lemprière* v. *Lange* (1) cannot be regarded as a binding authority. The infant in that case did not appear, the question as to his liability to pay costs was not argued, and there is nothing to shew that the order for payment of costs was not made per incuriam.

It is believed that there are many instances of orders against infants being made without costs which would in ordinary course have carried costs if the defendant had not been an infant.

KEKEWICH J. There is something to my mind inconsistent, apart from strict law, in saying that the Court can pronounce a decree against an infant, and cannot follow it up by ordering the infant to pay costs. How such an order is to be executed is another matter. The question I have to decide is whether there is any law which prevents my doing that which common sense dictates to be right. I have here a case of wrong, not of actual fraud, but of absolute wrong on the part of the defendant, in representing his business to be that of the plaintiff. Is that a case in which an infant can be ordered to pay costs? The case of *Chubb* v. *Griffiths* (2) is not very satisfactory. The record in that case has been referred to by Mr. Registrar Jackson, who has taken great interest in the present case, and it

(1) 12 Ch. D. 675. (2) 35 Beav. 127. (3) 2 Madd. 40.

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does not appear from the decree, which bears the name of a very careful registrar, that the defendant was an infant. It is framed "upon hearing counsel for the defendant" as if the defendant was a person sui juris. The judgment of the Master of the Rolls is also a little puzzling. "In such a case," he says, "I am of opinion, upon the principle laid down in *Cory* v. *Gertcken* (1), that infancy cannot protect him from paying the costs of the suit." In *Chubb* v. *Griffiths* (2) the defendant, who was stated to be an infant, sold articles and declared positively that they were manufactured by the plaintiff Chubb, and the Master of the Rolls said that he, having done that, was "not at liberty to say that he was ignorant of the fact," and that "he was bound to make a proper inquiry before he made so positive a representation." That was a case of wrong similar in character to the present case, but the decision does not seem to be capable of being used to establish any principle. The report is very short, and I might hesitate to adopt the case as an authority if it stood alone. But then there is also the case, to which my attention has been called to-day, of *Lemprière* v. *Lange*. (3) It is true that the question of costs was not the question specifically argued in that case. The action was brought against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age. It was held that the lease must be declared void, not being for the benefit of the infant, that possession must be given up, and the defendant restrained by injunction from selling or parting with any of the furniture and effects, but that the infant was not liable for use and occupation. The main question argued was whether he could be held so liable, and the cases of *Chubb* v. *Griffiths* (2) and *Cory* v. *Gertcken* (1) were referred to (4), and eventually when the Master of the Rolls, Sir George Jessel, gave judgment, he said that the plaintiff could not at the same time claim to have the lease declared void and ordered to be delivered up to be cancelled, and to make the defendant liable for use and occupation, and after saying that the injunction must go, he concluded by

(1) 2 Madd. 40.
(2) 35 Beav. 127.
(3) 12 Ch. D. 675.
(4) Ibid. 677.

saying, "the defendant must pay the costs of the action." Mr. Dennis relies on the facts that the defendant in that case did not appear, and that the question as to costs was apparently not seriously argued, and says I ought not to take that decision as an authority. But I do not think I can pass over the distinct words of Sir George Jessel, who knew practice as thoroughly as any judge who ever sat on the bench, but that I must treat it as a judicial decision. *Lemprière* v. *Lange* (1) was referred to without comment by Sir George Jessel in *Ex parte Jones* (2), which otherwise has nothing to do with this case. In Seton on Judgments, 5th ed. p. 837, the form of the order in *Lemprière* v. *Lange* (1) as regards the main point argued is referred to, though the form of the order as to costs is not mentioned, and Mr. Waggett tells me that the rule in *Chubb* v. *Griffiths* (3) is referred to in the text-books. I do not think I need add anything as to the principle. The order must go as it has been drawn up, and be dated as of to-day.

Solicitors: *Osborn & Osborn; Sheffield, Son & Powell.*

(1) 12 Ch. D. 675. (2) (1881) 18 Ch. D. 109.
(3) 35 Beav. 127.

C. C. M. D.

KEKEWICH J.

1898

Dec. 9, 16, 21.

In re JACKSON & CO., LIMITED.

Company—Shares—Payment in Cash—Contract in Writing—Omission to File —"Inadvertence"—Sufficiency—Supplemental Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-ss.* 1, 4.

By a contract in writing dated October 18, 1897, the owner of a business agreed to sell it to a company for a specified sum of money to be paid wholly or partly in cash, shares, or debentures as the directors should determine. Subsequently the directors allotted specified shares to the vendor as fully paid up in respect of a part of the purchase-money, but no written contract to that effect was entered into. The original contract was not filed as required by s. 25 of the Companies Act, 1867, the omission to file it being due to the fact that the parties were ignorant of the provisions of the Act. Upon an application by the vendor for an order for the filing of the original contract with the Registrar of Joint Stock Companies under the provisions of s. 1 of the Companies Act, 1898 :—

Held, that the omission to file the contract was due to "inadvertence" within the meaning of the Act:

Held, however, that the contract was not sufficient within the meaning of the Act, inasmuch as the determination by the directors as to the mode in which payment was to be made was supplemental to the original contract, and without this determination there was no complete contract:

Held, therefore, that there must be an order that a supplemental contract be entered into, that the supplemental contract be filed with the original contract, and that the entire contract when so filed should operate as if it had been filed at the time of the issuing of the shares.

MOTION.

By an agreement in writing dated October 18, 1897, and made between Edward John Thompson as vendor of the one part, and Jackson & Co., Limited, of the other part, the vendor agreed to sell, and the company agreed to purchase, the vendor's business of coachbuilder, carriage manufacturer, and wheelwright. By clause 2 of the agreement it was provided that the purchase price should be the sum of 7375*l.*, which was to be paid by the company "wholly or partly in cash, shares, or debentures as the directors of the company shall determine."

The business of the vendor was duly transferred to the company in pursuance of this agreement. A part of the purchase-money was paid to the vendor in cash and by the issue of

debentures to him, and there remained due to him a balance of 2580*l.*

In respect of this balance the directors of the company on July 6, 1898, allotted and issued to the vendor 258 shares of 10*l.* each expressed to be fully paid up and numbered 343 to 600 inclusive; but no written contract to that effect was entered into.

Neither the agreement of October 18, 1897, nor any other contract in writing in respect of the shares, was filed with the Registrar of Joint Stock Companies pursuant to s. 25 of the Companies Act, 1867.

It appeared that the failure to file any such contract as required by the Act was attributable to ignorance on the part of the vendor and the directors of the company of the provisions of the Companies Acts.

This was a motion by E. J. Thompson, the vendor, under the provisions of the Companies Act, 1898 (61 & 62 Vict. c. 26) (1), for an order for the filing with the Registrar of Joint Stock Companies of a sufficient contract in writing relating to the issue of the shares as part of the consideration payable to the

(1) Sect. 1, sub-s. 1, of the Act provides as follows: "Whenever .... any shares in the capital of any company under the Companies Acts, 1862 and 1890, credited as fully or partly paid up shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract or no sufficient contract is filed with the Registrar of Joint Stock Companies, in compliance with s. 25 of the Companies Act, 1867, the company or any person interested in such shares or any of them may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall, in relation to such shares, operate as if it had been duly filed with the registrar aforesaid before the issue of such shares."

By sub-s. 4, "Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may, in lieu thereof, direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period it shall in relation to such shares operate as if it were a sufficient contract in writing within the meaning of s. 25 of the Companies Act, 1867, and had been duly filed with the registrar aforesaid before the issue of such shares. . . ."

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applicant by the company on the sale of his business, and that directions might be given that, on such contract in writing being filed within fourteen days from the date of the order, it should in relation to such shares operate as if it had been duly filed with the registrar before the issue of such shares.

J. R. V. Marchant, for the applicant, the vendor. I ask the Court for permission to file the contract of October 18, 1897, under s. 1, sub-s. 1, of the Companies Act, 1898. It is submitted that that contract is a "sufficient contract in writing" to take shares within the meaning of the sub-section, and in conformity with the principle of construction of s. 25 of the Companies Act, 1867 (1), laid down in the case of *In re Kharaskhoma Exploring and Prospecting Syndicate* (2); and see *In re Maynards, Limited* (3), which case, however, was not followed by Romer J. in *In re S. Frost & Co., Limited.* (4) The fact that there was an option reserved to the directors to determine whether payment was to be in cash, shares, or debentures did not prevent the contract from being a sufficient contract to take shares: see *Barrow's Case.* (5)

It is clearly not necessary that the numbers of the shares should be specified: *In re Delta Syndicate* (6); *In re Buenos Ayres and Campana Ry. Co.* (7); *Elsner and McArthur's Case.* (8) It is clear from *Barrow's Case* (5) that such a contract as this is within the compulsion of s. 25 of the Companies Act, 1867, and if within the compulsion it must, it is submitted, be also within the benefit. When a contract gives an option, and the option has been exercised, the contract is complete: *Brown* v. *Royal Insurance Co.* (9); *Layton* v. *Pearce.* (10)

If, however, the contract is not deemed sufficient, then I ask

(1) The Companies Act, 1867, s. 25, is as follows: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

(2) [1897] 2 Ch. 451.
(3) [1898] 1 Ch. 515.
(4) [1898] 2 Ch. 556.
(5) (1880) 14 Ch. D. 432.
(6) (1885) 30 Ch. D. 153.
(7) W. N. (1875) 59.
(8) [1895] 2 Ch. 759.
(9) (1859) 1 E. & E. 853.
(10) (1778) 1 Doug. 15.

the Court to grant relief under sub-s. 4 of s. 1 of the Act of 1898 by directing the filing of a memorandum in writing stating the consideration, and that the option to pay part of the purchase-money in shares was exercised.

The company did not appear.

Cur. adv. vult.

Dec. 21. KEKEWICH J. This is one of the numerous cases which have come before the Courts under the Companies Act, 1898 (61 & 62 Vict. c. 26), and it raises one or two new questions. The applicant in the present case asks for the registration of a sufficient contract under s. 1, sub-s. 1, of the Companies Act, 1898, to operate from the date upon which it ought to have been registered, or else, in the alternative, that a memorandum in lieu of the contract may be filed under sub-s. 4. I do not think that I ought to do either of the things which are asked, unless the omission to file a contract was either "accidental or due to inadvertence." In this case the accident or inadvertence depends on the ignorance of the vendor and the directors of the company of the provisions of the Companies Act, 1867. It is somewhat strange that gentlemen should engage in selling a business to a company, and, to some extent for debentures or shares, and yet not know or take the trouble to inquire about the provisions of the statutes which affect such dealings. I have, however, positive evidence that the parties were, in fact, ignorant of the provisions of the Act of 1867, and I think I may fairly say that the omission to file the necessary contract was due to "inadvertence." I am, therefore, in a position to use the remedial powers given by the Act of 1898. This is a peculiar case. The form of the contract which was entered into between the vendor and the company was for the sale of the business in general terms; but clause 2 of the agreement provided that the purchase price for the business was to be 7375*l.* to be paid by the company wholly or partly in cash, shares, or debentures as the directors of the company should determine. I am asked to decide in the first place whether that contract is sufficient, although the numbers of the shares were not specified. That

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is no objection. It is quite settled that under the Act of 1867 a contract is good notwithstanding that the numbers of the shares are not specified: *In re Delta Syndicate.* (1) But if such a contract as the one before me were filed, would it be a sufficient contract? I am clearly of opinion that it would not, for the determination by the directors as to the mode in which payment is to be made is supplemental to the original contract, and without this determination there is no complete contract. If the contract, therefore, which I am asked to order to be filed is not a sufficient contract duly made in writing, it ought not to be filed. The directors, it is true, met and determined to issue shares in part payment of the purchase price; but that has not been put into the form of a contract. The Legislature, by requiring a sufficient contract in writing, points to the making of a contract ad hoc. There is no reason why the vendor should not reduce this contract into a formal contract to accept the 258 shares which have been allotted to him by the directors; that contract would be supplemental, and the two together would make a sufficient contract in writing. I think that is the preferable course. I might order a memorandum to be filed under sub-s. 4; but I do not think the filing of the requisite contract which I have specified will cause delay or inconvenience or be impracticable. There will, therefore, be an order that a supplemental contract be entered into, and that the supplemental contract be filed with the original contract, and that the entire contract when so filed shall operate as if it had been filed at the time of the issuing of the shares.

Solicitors: *G. S. Warmington & Co., for Warmington, Thompson & Warmington, Dudley.*

(1) 30 Ch. D. 153.

C. C. M. D.

CHETWYND *v.* ALLEN.

ROMER J.

1898

May 18, 19, 24, 25; *Nov.* 1, 2, 3, 4; *Dec.* 20.

[1896 C. 3532.]

Mortgage—Two Properties—Mortgagor Trustee of one Beneficial Owner of other—Loan by Third Party on Promise to Transfer Mortgage—Misrepresentation—Part Payment to First Mortgagee with Money Lent—Second Mortgage of one Property only—Right of Second Mortgagee to a Charge on both Properties comprised in First Mortgage—Merger.

C., being entitled as trustee for his wife to property X. and beneficially to property Y., mortgaged both properties, with the consent of his wife, to T. to secure 2000*l.* C. afterwards requested M. to lend him 1200*l.* to pay off an existing mortgage on X., promising to transfer the mortgage to him, but without disclosing the fact that X. belonged to his wife, or informing him of the amount of, or that Y. formed part of the security for, the first mortgage.

M. advanced the 1200*l.*, and C. applied 1000*l.* of that sum in paying off part of the 2000*l.* owing to T., and afterwards executed a mortgage of X. to M. to secure the 1200*l.* so advanced by him:—

Held, that when M. advanced the 1200*l.* on the above promise by C., and the 1000*l.* was applied in part payment to T., the charge on both X. and Y. was kept alive in equity in favour of M.

Patten v. *Bond*, (1889) 60 L. T. 583, followed.

Held, further, that M. did not lose the benefit of his charge by taking the equitable mortgage executed by C. on X., the charge thereby given not operating as a release or extinguishment of the prior charge and there being no reason for presuming a merger of the securities.

There is no merger at law even of a lower in a higher security if the remedy given by the latter is not co-extensive with that given by the former: *Bell* v. *Banks*, (1841) 3 Man. & G. 258.

By an indenture dated June 4, 1891, and made between W. J. B. Chetwynd, the husband of the plaintiff, of the one part, and Hull Terrell of the other part; Chetwynd, with the consent of the plaintiff, conveyed certain premises called the "Cedars," which he held as trustee for the plaintiff, and certain other premises called the "Riding School," which he held in his own right, to Terrell by way of mortgage, to secure the payment of the principal sum of 2000*l.* lent to him by Terrell, with interest.

In the month of November, 1892, Chetwynd requested the defendant Mynors to advance him the sum of 1200*l.* in order

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to pay off an existing mortgage for that amount on the Cedars, stating that he expected to repay the amount shortly out of a larger sum which he hoped to raise by a mortgage of the Cedars and other property, but without disclosing the fact that the Cedars belonged to the plaintiff, and that not only that property but also the Riding School was charged with a sum exceeding 1200*l.* in favour of Terrell, and he expressly stated to the defendant Mynors that he should have a transfer of the mortgage to Terrell of June 4, 1891.

On the faith and footing of these representations the defendant Mynors advanced the 1200*l.*, and in the month of December, 1892, Chetwynd applied 1000*l.*, part of this 1200*l.*, in paying to Terrell part of the principal sum of 2000*l.* secured by the mortgage of June 4, 1891.

On January 16, 1893, Chetwynd for the first time informed Mynors that the 1200*l.* did not entirely pay off Terrell's mortgage, and on the same day Chetwynd as beneficial owner conveyed the Cedars to Mynors by way of mortgage to secure the 1200*l.* and other sums.

The mortgage recited, as the fact was, that the 1200*l.* had recently been advanced in order to enable Chetwynd to pay off a then existing mortgage on the Cedars; but as Mynors did not then know that the Cedars belonged to the plaintiff, the mortgage did not recite the fact that the money had been advanced on the promise by Chetwynd that Mynors should have a transfer of the mortgage of June 4, 1891.

By an indenture of transfer dated January 23, 1893, and made between Terrell of the one part and the defendant Mynors of the other part, and another indenture of transfer made between the defendant Mynors of the one part and the defendant Allen of the other part, the sum of 1000*l.* and interest then owing on the security of the mortgage of June 4, 1891, was assigned to the defendant Allen, and the premises comprised in that mortgage were conveyed to him in fee simple subject to the equity of redemption existing therein.

By two several instruments expressed to be dated January 13 and March 21, 1893, and made between Chetwynd of the one part and the defendant Colyer of the other part, Chetwynd

purported to charge the premises in favour of Colyer to secure certain moneys then owing by Chetwynd to Colyer.

The plaintiff claimed to redeem the defendant Allen, and for that purpose to have all necessary accounts taken and a declaration that she was entitled to the premises free from all estate and interest of the defendants Mynors and Colyer respectively, and a delivery up by them of all documents relating to the premises, and an injunction to restrain them from entering upon or intermeddling with the premises.

The action came on for trial.

Neville, *Q.C.*, and *MacSwinney*, for the plaintiff.

Farwell, *Q.C.*, and *Mark Romer*, for the defendant Allen.

Levett, *Q.C.*, and *Theobald*, for the defendant Mynors.

O. L. Clare, and *T. L. Higgins*, for the defendant Colyer.

It was urged on the part of the defendants that the plaintiff must be taken to have allowed her husband to represent himself as the owner of the property, and that she was therefore estopped as between herself and the mortgagees of the mortgages impeached from denying that her husband was the owner of the property, and that under the circumstances she must be taken not to have an equity as good as or as capable of being enforced against the equities of the mortgagees; and further, that as she had given her husband, the trustee, authority to borrow, it must be taken that he had power to borrow generally.

ROMER J. gave judgment for the plaintiff on all the above points, reserving for further consideration the question which had been raised as to the right of the defendant Mynors to be subrogated to the rights of Terrell under the mortgage of June 4, 1891, so far as concerned the 1000*l.* paid off to Terrell out of the 1200*l.* advanced by Mynors to Chetwynd.

On November 1 the case came on again for hearing on the point reserved.

Levett, *Q.C.*, and *Theobald*, for the defendant Mynors. When Mynors advanced the 1200*l.* on the representations and

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promise made to him by Chetwynd, and the 1000*l.* was applied in part payment to Terrell of what was due to him under the deed of June 4, 1891, the mortgage on the Cedars and the Riding School to the extent of that 1000*l.* was kept alive in favour of Mynors. In every case it is a question of intention, and the real intention here was to keep the mortgage alive: *Earl of Buckinghamshire* v. *Hobart* (1); *Adams* v. *Angell* (2); *In re Pride* (3); *Phillips* v. *Gutteridge* (4); *Forbes* v. *Moffatt* (5); *Burrell* v. *Earl of Egremont* (6); *Irby* v. *Irby* (7); *Patten* v. *Bond.* (8) In any event Mynors is entitled on the principle of subrogation to stand in the shoes of Terrell to the extent of the 1000*l.* paid off to him out of the 1200*l.*: *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (9); *Baroness Wenlock* v. *River Dee Co.* (10)

[They also referred to *Yorkshire Railway Wagon Co.* v. *Maclure.* (11)]

Neville, Q.C., and *MacSwinney*, for the plaintiff. If it is intended to keep a mortgage alive the intention must be so expressed, otherwise the incumbrance which is paid off is merged: *Parry* v. *Wright* (12); *Medley* v. *Horton* (13); *Liquidation Estates Purchase Co.* v. *Willoughby* (14); *Minter* v. *Carr* (15); and here no intention to keep the mortgage alive is shewn.

[On the question as to subrogation, they referred to *Portsea Island Building Society* v. *Barclay.* (16)]

Farwell, Q.C., and *Mark Romer*, for the defendant Allen, and *O. L. Clare* and *T. L. Higgins*, for the defendant Colyer, took no part in the argument.

Levett, Q.C., in reply.

Cur. adv. vult.

(1) (1818) 3 Swans. 186.
(2) (1877) 5 Ch. D. 634.
(3) [1891] 2 Ch. 135.
(4) (1859) 4 De G. & J. 531.
(5) (1811) 18 Ves. 384.
(6) (1844) 7 Beav. 205, 232.
(7) (1858) 25 Beav. 632.
(8) 60 L. T. 583.
(9) (1885) 29 Ch. D. 902.
(10) (1883) 36 Ch. D. 675, n., 683.
(11) (1881) 19 Ch. D. 478.
(12) (1823) 1 S. & S. 369; (1828) 5 Russ. 142.
(13) (1844) 14 Sim. 222, 226.
(14) [1896] 1 Ch. 726; [1898] A. C. 321.
(15) [1894] 2 Ch. 321.
(16) [1895] 2 Ch. 298.

Dec. 20. ROMER J. The point reserved for consideration is one of some difficulty. [His Lordship stated the facts, and proceeded :—]

On these facts I have to consider what Mynors' rights are. Now, in my opinion, when Mynors advanced the 1200*l.* on the representations and promise above mentioned, and the 1000*l.* was applied in part payment to Terrell, the charge on the Cedars and school to the extent of the 1000*l.* was kept alive in equity in favour of Mynors, so far as that could be done without prejudicing Terrell or the plaintiff. So far as Chetwynd was concerned, he could not complain that the charge was kept alive also on the school, seeing that it was by his fraud that the true facts as to Terrell's charge were kept hidden from Mynors. As regards Terrell, he clearly was not prejudiced, for the balance of his mortgage debt had priority over Mynors' charge; and as regards the plaintiff she was not prejudiced, so long as no extra costs were thrown on the Cedars by reason of the original mortgage debt of 2000*l.* being divided as between Terrell and Mynors (and this I can provide for), and provided that as between the school and the Cedars the former remained primarily liable for the debt as between her and her husband. This primary liability clearly became in no way affected merely because the 1000*l.* debt and the securities for the same became the property of Mynors and not of Terrell. Of course, by subsequent events the school might have been so dealt with to the prejudice of the plaintiff as to prevent Mynors from asserting his equitable right to the benefit of the 1000*l.* debt and securities for the same. But, fortunately for him, when the plaintiff came to assert her rights Mynors owned the school, and it is still available to the plaintiff as the primary security for the 2000*l.* charged with her assent, and Mynors acknowledges the primary liability of the school.

The case so far is not without authority to support the view I have taken. I refer to *Patten* v. *Bond* (1), which was decided by Kay J. on three separate grounds, and one of those grounds was based on the principle which I have given effect to in this case.

(1) 60 L. T. 583.

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The next question is whether Mynors lost the benefit of his equitable security arising under the circumstances above mentioned by taking the mortgage of January 16, 1893. I cannot see why I should hold that he did. That mortgage was not a legal mortgage, so there was no merger of a lower security in a higher. Of course, if the mortgage had been a legal one, Mynors would have held free from the plaintiff's equity, seeing that he would have acquired the legal estate without notice of the plaintiff's rights. The existence of the equitable charge of January 16, 1893, for the 1200*l.* is quite compatible with the coexistence of the equitable charge for the 1000*l.* The charge of January 16, 1893, did not operate as a release or extinguishment of the prior charge. The recital in the charge of January 16, 1893, as to how the 1200*l.* came to be advanced is not antagonistic to the fact that the advance was also on terms that Mynors should have the benefit of the prior charge. And certainly Mynors cannot be held to have lost the benefit of his prior charge, because by reason of the fraud of Chetwynd he may have been ignorant of his exact rights or of the necessity of preserving them. Nor can I see any reason for presuming merger of the securities. The debts secured were not identical, the debt first secured being 2000*l.* and that secondly secured 1200*l.*; and the securities were not identical, the first security being on the Cedars and the school, and the second security being on the Cedars alone. The Courts do not hold merger to take place under such circumstances (see, for example, cases at law, *Norfolk Ry. Co.* v. *M'Namara* (1) and *Holmes* v. *Bell*) (2); and there is no merger at law even of a lower in a higher security, if the remedy given by the latter is not coextensive with that given by the former (see *Bell* v. *Banks* (3)). And in the case before me there is another ground on which no merger should be held to take place—namely, that the second charge was ineffectual owing to its not being binding on the plaintiff, the true owner of the property, and a good prior security will not be held to merge in a later inoperative one. I therefore hold and declare that Mynors is entitled as against

(1) (1849) 3 Ex. 628. (2) (1841) 3 Man. & G. 213.
(3) (1841) 3 Man. & G. 258.

the plaintiff to the extent of 1000*l.* principal and interest to a charge upon the Cedars, but so that the school is to be the primary security and so that no mortgagee's costs be unduly thrown on the Cedars by reason of the original mortgage debt of 2000*l.* given to Terrell having become divided between him and Mynors. I should add that, though in the hands of Terrell the 1000*l.* bore interest at a higher rate, yet in the hands of Mynors I think it ought only to bear interest at the rate he agreed to charge—namely, 5 per cent. The above decision renders it unnecessary for me to consider whether Mynors could have been held entitled as above on other grounds, such as that based on the principle of subrogation, or on the general doctrine that the plaintiff, coming to the Court for equitable relief, should be put on terms.

Solicitors: *Lumley & Lumley; Pontifex, Hewitt & Pitt; Colyer & Colyer.*

G. M.

JOHNS *v.* WARE.

[1898 J. 2033.]

Bill of Sale—Mortgage—Freeholds with fixed Machinery and Fixtures—Trade Machinery—Non-registration—Power of Sale—Invalidity—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36).

The test whether a mortgage of a building and fixtures requires registration under the Bills of Sale Act as respects the fixtures, laid down by *Ex parte Barclay* (1874), L. R. 9 Ch. 576, namely, that it depends on whether the deed gives power to the mortgagee to sell or take possession of the fixtures separately from the building, is not limited to leaseholds, but is equally applicable to a mortgage of freeholds, notwithstanding that in the latter case fixtures might be deemed to pass as part of the fee simple.

MOTION.

This was an application for an injunction to restrain the trustee of a creditor's deed from selling certain trade machinery and fixtures included, with a freehold mill, in a mortgage, which raised the question whether a mortgage of property of

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this character required registration, as respects the fixtures, under the Bills of Sale Act, 1854. The facts, so far as material, were as follows :—

By an indenture of mortgage of March, 1869, a freehold factory in the town of Bradford, in the county of Wilts, "together with the steam and other engines boilers mill wheels driving gear mill gear and millwright work machinery appliances fixtures and chattels of every description affixed or annexed to or connected with the said manufactory messuages and hereditaments herein described or which at any time or times hereafter during this security shall be affixed to or connected with the same manufactory messuages and buildings" was conveyed by way of mortgage to secure 4500*l*. The mortgage contained a power of sale enabling the mortgagees or the survivor of them, or the executors or administrators of such survivor, their or his assigns, "to sell the same manufactory messuages hereditaments and premises or any part thereof" in the usual form, "with power to sell all or any part of the steam and other engines boilers mill wheels driving gear mill gear and millwright work machinery appliances fixtures or chattels of any description comprised in this security or intended so to be separately from the freehold."

This mortgage was not registered under the Bills of Sale Act, 1854.

By an indenture of November 17, 1883, the said sum of 4500*l*. secured by the above-mentioned mortgage and the interest thenceforth to become due for the same, "and the benefit of all securities for the same" was assigned to the plaintiff absolutely; and by the same deed the premises included in the above-mentioned mortgage were conveyed to the plaintiff to hold the said premises, as to such part thereof as was of the nature of real estate, unto and to the use of the plaintiff in fee simple, and as to such part thereof as was of the nature of personal estate, unto the plaintiff absolutely. This deed contained a fresh proviso for redemption by the mortgagor, a fresh covenant for payment of interest, and a fresh power of sale which also authorized the mortgagee to sell the fixed or movable machinery separately from the land or buildings.

This deed was not registered under the Bills of Sale Act, 1878.

In 1897 the mortgagor executed a deed of assignment of all his property in trust for creditors; the defendant was the trustee of this deed.

In December, 1898, the defendant advertised for sale the whole of the fixed and movable woollen cloth machinery in the manufactory mortgaged as aforesaid to the plaintiff, whereupon the writ in the present action was issued asking for foreclosure, and an injunction to restrain the defendant from removing or disturbing any machinery or fixtures affixed to the said mortgaged land and premises, and from selling or disposing of the same.

The plaintiff now moved for an interim injunction in the terms of his writ.

Neville, Q.C., and *Vaughan Hawkins*, for the plaintiff. This is a mortgage of freeholds, and the deed of 1869 effectually conveyed these fixtures as part of the fee simple; this deed would not require registration under the Bills of Sale Act, 1854, any more than a mortgage of land containing minerals with power to work them: the Bills of Sale Act, 1854, contains no such provision as that contained in the Bills of Sale Act, 1878, making trade machinery, even when fixed to the land, personal chattels. The power to sell the fixtures separately from the land is only an amplification of the earlier part of the power to sell the mortgaged property together or in parcels, or "any part thereof." The decisions in *Ex parte Daglish* (1) and *Ex parte Barclay* (2) deal only with leaseholds, where the mortgagor was only a lessee, and the test given in *Ex parte Barclay* (2) does not apply to a mortgage of freeholds where the fixtures would pass to the mortgagee as part of the land conveyed. The distinction between landlord's fixtures—that is, fixtures passing with the freehold—and tenant's fixtures is expressly recognised in *Ex parte Daglish*. (3) The Bills of Sale Act, 1854, has no application to fixtures

(1) (1873) L. R. 8 Ch. 1072. (2) L. R. 9 Ch. 576.
(3) L. R. 8 Ch. 1083–4.

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that pass by a grant of the land: *Mather* v. *Fraser*. (1) That decision is applicable to this mortgage; the deed of 1883 was in effect only a transfer of the existing mortgage, and did not require registration under the Bills of Sale Act, 1878: *Ex parte Turquand* (2), and the plaintiff's position is the same as that of the original mortgagees. Plaintiff is therefore entitled to these fixtures and trade machinery as part of his security.

Farwell, Q.C., and *A. E. Russell*, for the defendant. The test whether a mortgage deed of a building and fixtures requires registration under the Bills of Sale Act, as given in *Ex parte Barclay* (3), is general, and not to be limited to a mortgage of leaseholds. The mortgagees in the deed of 1869 were authorized to sell the fixtures separately from the land: that brings the mortgage, quâ the fixtures, within the operation of the Bills of Sale Act: *Ex parte Daglish*. (4) This proposition was already recognised in *In re Yates* (5), though the mortgage in that case was held not to be a bill of sale, because the deed gave no power to take the trade machinery as chattels. The fixtures, too, are separately and expressly conveyed. *Small* v. *National Provincial Bank of England* (6), in which *In re Yates* (5) was distinguished, is exactly in point so far as the trade machinery is concerned. The deed of 1883 is not a mere transfer: it is substantially a new mortgage with a fresh covenant for payment of interest, and a new power of sale, which also gives power to sell the fixtures separately from the land, and this mortgage not having been registered could not have passed the trade machinery at all: the defendant is therefore entitled to sell the fixtures and trade machinery in the manner proposed.

Neville, Q.C., in reply.

ROMER J. This case has been very well argued, and, no doubt, the points involved are points of considerable interest and of some difficulty; but I gather that it is important for the parties to have an immediate decision, as the sale of these

(1) (1856) 2 K. & J. 536.
(2) (1885) 14 Q. B. D. 636.
(3) L. R. 9 Ch. 576.
(4) L. R. 8 Ch. 1072.
(5) (1888) 38 Ch. D. 112.
(6) [1894] 1 Ch. 686.

trade fixtures is advertised to take place very shortly. I therefore will not reserve judgment, but deal with the case at once.

I do not see my way to grant an injunction. I myself think that, since *Ex parte Daglish* (1) and *Ex parte Barclay* (2), this has been settled law, that a mortgage of land, coupled with "a power given to the mortgagee to sell, separately from the land, all, or any part of the trade fixtures," is a bill of sale under the Act of 1854 so far as the fixtures are concerned. It is said that those cases, when examined, will be found to depend entirely on the consideration that the mortgage there was by demise, and that the mortgagor had a different interest in the land and in the chattels, as the mortgagor was himself only a lessee.

Certainly, so far as I am aware, those decisions have not been considered to be so limited; and, when the reasons for the decisions are looked at, it does not appear to me that there is any such limitation. Under the Act of 1854, a bill of sale is defined to include a licence to seize chattels, and chattels are defined so as to include fixtures. If, then, you find in a mortgage a licence to seize—and a licence to sell chattels implies a licence to seize—then if you find a licence to seize and sell chattels, quâ chattels by themselves, it appears to me you bring yourself at once within the provisions of the Bills of Sale Act, 1854. As I put it in the course of the argument, suppose an owner of land, to which trade fixtures were attached which were absolutely his, mortgaged the trade fixtures separately, giving the mortgagee licence to remove and sell them, clearly that would be a bill of sale, and not the less so because in the same mortgage deed he might have mortgaged the freehold. It appears to me that if you once get from a mortgage deed, though it be a mortgage of the freehold, that there is a special mortgage of the fixtures, so that the mortgagee has a power to sell and deal with them as something apart from the freehold, you bring yourself within the provisions of the Bills of Sale Act of 1854. Indeed, if I doubted that myself I should feel bound by the observations of all the members of the Court of Appeal in *In re Yates* (3) who had to consider the cases of *Ex parte*

(1) L. R. 8 Ch. 1072. (2) L. R. 9 Ch. 576. (3) 38 Ch. D. 112.

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Daglish (1) and *Ex parte Barclay*. (2) I need not repeat the judgments given by the members of the Court of Appeal who decided that case. It appears to me that they took the same view of *Ex parte Daglish* (1) and *Ex parte Barclay* (2) as I have taken myself on the present occasion.

That really decides this case, unless, indeed, it were open to the plaintiff to take the point which Mr. Vaughan Hawkins more especially referred to, namely, that even if the deed of 1869 were a bill of sale, and therefore void so far as it gave anything like a separate charge on the fixtures, yet it would leave the mortgagee's rights, as a mortgage of the freehold, untouched, so far as the fixtures are concerned—that is to say, that the plaintiff might still say he had a charge, as it were, on the trade fixtures as being part of the freehold. It appears to me that is not now open for argument. *Ex parte Daglish* (1) is a clear case in point, and there are other authorities, including the case of *Small* v. *National Provincial Bank of England* (3) before Stirling J. It is clearly too late at the present day to attempt to reopen the grounds on which *Ex parte Daglish* (1) and the other cases were decided. If you once hold that there is a mortgage of land and of fixtures as chattels, and that the mortgage quâ the chattels is a bill of sale, it is impossible for the mortgagee to set up his right to those chattels as passing under the mortgage of the land.

For these reasons I must refuse the injunction.

Solicitors : *Eyre, Dowling & Co., for C. J. Jones, Trowbridge ; Russell, Son & Cumming.*

(1) L. R. 8 Ch. 1072. (2) L. R. 9 Ch. 576.
(3) [1894] 1 Ch. 686.

W. C. D.

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Dec. 7, 8, 21.

In re SMITH.
SMITH *v.* SMITH.

[1891 S. 1719.]

Will—Construction—Gift of Legacies followed by Gift of Real and Personal Estate in one Mass—Mortgaged Estate Devised Free from Incumbrances—Pecuniary Legatees and Annuitants—Priorities—Marshalling since Real Estate Charges Act, 1854 (17 & 18 *Vict. c.* 113).

A testator, who died in 1889, after legacies of 100*l.* to four of his children, made several specific devises, freed and discharged from any mortgages there might be thereon at the time of his death, for the benefit of a son and three daughters, and declared that if he should sell any of the houses thereinbefore given for the benefit of his daughters, his trustees should out of his residuary estate stand possessed of a sum equivalent to the price received for the same upon trusts similar to those declared respecting the house sold: the testator then gave all other his real and personal estate upon trust to pay annuities of 250*l.* to each of his sons, and out of the balance of the income thereof to pay the specific incumbrances upon the said estate, and after payment off of the said incumbrances, upon trust to assign his said residuary estate to his two sons equally. The testator sold one of the specifically devised houses for 9800*l.* The estate proved insufficient for payment in full to all the beneficiaries:—

Held, (1.) that the four pecuniary legacies were charged upon the entire residue, and had priority over all other payments directed to be made to beneficiaries; (2.) that the annuities were only given to the sons in their capacity of residuary legatees, and were therefore not payable until the sum representing proceeds of sale of realty sold by the testator, and the mortgage debts on the specifically devised realty, had been provided for; (3.) that the 9800*l.*, representing proceeds of sale, was to be treated as an ordinary legacy made payable out of residue; and (4.) that the rule in *Lutkins* v. *Leigh*, (1734) Cas. t. Tal. 53, that the pecuniary legatee has priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mortgage debt paid off out of residue, applied, not having been expressly negatived by the testator, and that the devisees of the mortgaged property were not entitled to compete with the legatees.

Porcher v. *Wilson*, (1866) 14 W. R. 1011, followed.

Smith v. *Smith*, (1860) 10 Ir. Ch. Rep. 89 and 461, not followed.

FURTHER CONSIDERATION.

George Hindes Smith, by his will dated August 13, 1885, after giving to each of his sons, George Thomas Smith and Henry Doggett Smith, and to each of his daughters, Alice

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Florence and Ada Maude, the sum of 100*l.*, gave to his said son Henry Doggett Smith a freehold house and garden and a meadow thereto adjoining situate at Harrow, in the county of Middlesex, "freed and discharged from any mortgage there may be thereon at the time of my death," and devised unto and to the use of his trustees therein named, their heirs, executors, administrators, and assigns, two leasehold houses in the City of London, a leasehold house in Nichol Square, and a freehold house in Brunswick Street, Haggerston, "freed and discharged from any mortgage there may be on the said houses at the time of my death," upon certain trusts for the benefit of his daughter Annie Lydia Jones, her husband and children, appointees and next of kin as therein provided, and gave to his said trustees, their executors, administrators, and assigns, two leasehold houses, 61, Cheapside, and 10, St. Swithin's Lane, "but free from any incumbrances that there may be thereon at the time of my death," upon trusts for the benefit of his said daughters, Alice Florence Smith and Ada Maude Smith, their respective husbands and children, appointees and next of kin, similar to those already declared in favour of his other daughter, Annie Lydia Jones; the testator then declared that if he should sell any of the said houses thereinbefore given to his trustees upon trust for his daughters, "then my executors and trustees shall out of my residuary estate stand possessed of a sum equivalent to the price I may have sold any such house for, and upon similar trusts to those declared concerning any such house as may have been sold." The testator then gave to his said trustees all other his real and personal estate whatsoever and wheresoever upon trust to pay to each of his sons, George Thomas Smith and Henry Doggett Smith, an annual sum of 250*l.* by equal quarterly payments, "and out of the balance of the income of my said residuary estate to pay off the incumbrances upon my said estate, and upon trust as soon as the incumbrances upon my estate shall have been paid off, to assign my said residuary estate to my said sons George Thomas Smith and Henry Doggett Smith equally."

The testator made a codicil to his will in January, 1887, by which, after reciting that he had by his will "given to my

trustees the residue of my real and personal estate upon trust to pay to each of my sons George Thomas Smith and Henry Doggett Smith an annual sum of 250*l.* as therein mentioned and out of the balance to pay off the incumbrances upon my estate, and upon trust, as soon as the incumbrances of my estate have been paid off, to assign my residuary estate to my sons George Thomas Smith and Henry Doggett Smith equally," he proceeded to settle the said interest of his son George Thomas Smith in terms not material for the purposes of this report. The testator sold in his lifetime the said house No. 61, Cheapside, given to his trustees upon trust for his two daughters, Alice Florence and Ada Maude, for a sum of 9800*l.*

The testator died in March, 1889.

In 1891 the present action was commenced for administration of the testator's estate. Numerous accounts and inquiries were directed, and, the estate proving insufficient, several questions now arose as to the priority of the various beneficiaries under the will, the principal ones being as to the position of the legatees and the annuitants, and whether the specific devisees were entitled as against the pecuniary legatees to have their respective incumbrances paid off out of the residuary estate.

Mulligan Q.C., and *A. J. Allen*, for the plaintiffs George Thomas Smith and his family. The four pecuniary legacies must have priority over everything ; there is no residue until they are satisfied ; the annuities are, in fact, legacies, and stand on the same footing. The pecuniary legatees have priority over the devisees : *Lutkins* v. *Leigh* (1) ; and are entitled to stand in the shoes of the mortgagees to the extent of the mortgage money paid off out of residue : *Hamilton* v. *Worley*. (2) The specific devisees cannot compete with pecuniary legatees and annuitants ; they can only be paid out of residue.

[ROMER J. Suppose the testator had expressly directed these mortgage debts to be paid out of his personal estate, could you then contend that they were not payable in priority to legacies ?]

(1) Cas. t. Tal. 53.

(2) (1793) 2 Ves. 62, 64.

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Yes, and the pecuniary legatees would be entitled to have the assets marshalled so that any payment in respect of the mortgage debts out of the personal estate would have to be recouped out of the mortgaged estates: *Porcher* v. *Wilson.* (1) The rule in *Lutkins* v. *Leigh* (2), in cases where the testator has negatived the application of Locke King's Act, has long been recognised: *Johnson* v. *Child.* (3)

[They also cited *Wythe* v. *Henniker* (4) and *Buckley* v. *Buckley.* (5).]

Neville, Q.C., and *Church*, for the defendants Annie Lydia Jones and her family. We do not admit that the legacies have priority. The case has nothing to do with Locke King's Act, or the equity referred to in *Hamilton* v. *Worley.* (6) The mortgage on the property specifically devised to us was a debt created by the testator and takes priority over all legacies. Mortgage debts should be paid out of the personal estate in preference to pecuniary legacies: *Smith* v. *Smith* (7): that decision is exactly in point, and was affirmed on appeal. (8)

Farwell Q.C., and *Ball*, for the defendant Henry Doggett Smith, adopted the same argument as to the property specifically devised, and cited *Burley* v. *Armstrong* (9), and 1 White and Tudor's Leading Cases, 7th ed. pp. 33 to 35.

Levett, Q.C., and *Rowden*, for the daughter Ada Maude and her family, adopted the above arguments so far as they were in favour of their client. We also contend that the annuities are not on the same footing as the legacies: they are only given to the two sons in their capacity of residuary legatees, and as part of the residue, and must be postponed to the 9800*l.*, which is in fact a pecuniary legacy for that amount, and to the mortgage debts on the specifically devised properties. The residue of this real and personal estate is given in one mass, and this 9800*l.* legacy is a charge on the residuary real estate: *In re Brooke.* (10)

(1) 14 W. R. 1011.
(2) Cas. t. Tal. 53.
(3) (1844) 4 Hare, 87, 94.
(4) (1833) 2 My. & K. 635, 644.
(5) (1887) 19 L. R. Ir. 544.
(6) 2 Ves. 62, 64.
(7) 10 Ir. Ch. Rep. 89.
(8) Ibid. 461.
(9) (1861) 12 Ir. Ch. Rep. 270.
(10) (1876) 3 Ch. D. 630.

Whinney, for the daughter Alice Florence, adopted this argument.

Mulligan, *Q.C.*, in reply. It is clear that the four pecuniary legacies have priority over everything else: *Greville* v. *Browne*. (1) The annuities are in the same position. The 9800*l.* is not a legacy; it is only a substitution for the specifically devised property. The case of *Smith* v. *Smith* (2), relied on for the specific devisees, is wrong, and not in accordance with the English authorities.

Cur. adv. vult.

Dec. 21. ROMER J. The first question I will deal with concerns the four pecuniary legacies given at the beginning of the will. *Greville* v. *Browne* (1) finally decided that where legacies are given generally, and there is a gift of the residue of the real and personal estate, the legacies are charged upon the entire residue. In the will before me the residuary devise takes the form of a gift of all other the testator's real and personal estate. In other cases, however, it has been held that a gift of the testator's real and personal estate not otherwise disposed of has the same effect as a gift of the residue. But, apart from these cases, in the will before me the testator has been his own interpreter, for in his codicil, after referring to his will, he says: "And whereas by my said will I have given to my trustees the residue of my real and personal estate," and then proceeds to make some alteration in the trusts. So that this case is, in my opinion, governed by *Greville* v. *Browne* (1), and the legacies are charged on the residue. It follows that all provisions made in the will for payments out of the residue proper are intended to be provided out of the testator's estate not specifically devised or bequeathed after satisfying the four legacies. Now, the mortgage debts on the specifically devised real estates are by the will expressly directed to be paid out of the residuary estate (see the clause immediately following the trusts of residue for the two sons). And by this direction, so far as it gave a beneficial interest in the residue to the devisees, I gather from the will the testator meant these debts to be paid

(1) (1859) 7 H. L. C. 689. (2) 10 Ir. Ch. Rep. 89, 461.

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out of the residuary estate proper, that is to say, the estate after satisfaction of the four legacies. Of course the mortgagees as creditors would have a prior right to any beneficiaries to be paid, but so far as they should exercise their rights and obtain payment out of residue, the four legatees would on the doctrine of marshalling, with which I shall hereafter have more particularly to deal, be entitled to stand in their shoes. And the same remarks, as to their being payable out of residue proper, apply to the sums which by the will have to be provided to take the place of the houses specifically devised in trust for his daughters in case the testator sold them in his lifetime. And even more strongly the remarks apply to the annual sums of 250*l.* each, directed to be paid to his two sons. In my opinion, therefore, the four legacies must be paid in priority to those mortgage debts, sums representing houses sold, and the two annual sums of 250*l.* each.

I will next deal with the question as to the position of the two sons in respect of the two annual sums of 250*l.* Now, nothing is said in the will expressly as to any order of payment out of the residue proper of the above-mentioned mortgage debts and sums representing houses sold. But on this will and codicil it appears to be assumed by the testator that these debts and sums will have been paid before anything goes to the two sons. The sons are made residuary legatees, and it appears to me that the two annual sums are only given to them in their capacity of residuary legatees, and as part of the machinery for allowing the true residue to be divided between them. After directing his trustees out of his residuary estate to pay the two annual sums, the testator proceeds to direct that "out of the balance of the income" of his residuary estate the trustees are to pay off the incumbrances on his residuary estate, and that when those incumbrances are paid off then the residuary estate is to be divided between the two sons. Clearly the two annual sums would cease when the residue was divided, and in my judgment the two sums are only intended to be paid to the sons as residuary legatees. And this view is supported by the wording of the codicil, where as regards the share of one of the two sons the testator treats the

250*l.* as being equivalent to the income of the residue up to the time that residue is divided. I think, therefore, the sons cannot claim to be paid anything in respect of the annual sums until the mortgage debts on the specifically devised realty, and the sum representing property sold, are paid. This brings me to the last question, which concerns the relative rights of the specific devisees of realty in respect of the mortgage debts, and those claiming the sum equal to the price at which one of the testator's houses was sold by him in his lifetime. Now, in the first place, I may say that in my opinion the last-mentioned sum is to be treated as an ordinary legacy made payable out of residue. I cannot see any sufficient reason for treating it differently merely because if the house had not been sold the devisee of it might have taken it subject to mortgages. I have, therefore, to consider what is the right of a devisee of real estate charged with a mortgage debt of the testator to have that debt paid off out of residue as against a pecuniary legatee. Now, after *Lutkins* v. *Leigh* (1) and before Locke King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mortgage debt paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty. It is difficult to justify this rule on principle. Seeing that the testator intended the mortgage debt to be paid off out of his residuary estate, it might have been supposed that the pecuniary legatee could not claim to be repaid by the devisee merely because the debt had been paid as contemplated out of the proper fund. Or the Courts might have been expected to hold that the devisee to the extent of the mortgage debt, and the pecuniary legatee to the extent of his legacy, were equally objects of the testator's bounty, and that the mortgage debt and legacy should therefore abate rateably, in case the residuary estate could not pay both in full. But the Courts became bound

(1) Cas. t. Tal. 53.

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by the rule above adverted to, however difficult it might be to justify it, and the time for questioning it has long since passed. See, for example, observations of Sir James Wigram when Vice-Chancellor in *Johnson* v. *Child* (1), where he pointed out that he was bound by the authorities. Of course a testator might by express provision in his will negative the application of the rule, but unless he did so, the rule was applied. The effect of the Real Estate Charges Act, 1854, commonly known as Locke King's Act, was to benefit the pecuniary legatee, and not to prejudice any rights he previously had in equity. So that if a testator by his will negatived the application of the Act, without directing that the rule should not apply, then, of course, the rule had to be applied. Accordingly, in *Porcher* v. *Wilson* (2), where a testator provided expressly for payment of his debts out of his residuary personal estate (but without mentioning his mortgage debts), the rule was applied by Wood V.-C. In that case, as the law then stood, before the amending Act of 1877, the provision was held to negative the application of the Act, and the debts to be paid out of the residuary personal estate were held to include mortgage debts. And the decree in that cause expressly provided that the mortgage debts were primarily payable out of the personal estate; but when the question of marshalling came before the Court, it was declared that the devisees of the mortgaged estate were not entitled to have the mortgage satisfied out of the personal estate until the pecuniary legatees were satisfied. It seems to me impossible to distinguish the case now before me from the above authorities. All that the testator has really done by his will is to negative the application of Locke King's Act and the amending Acts as to the mortgage debts, by expressly providing for payment of those debts out of his residuary estate. I cannot gather from the will that he has expressly or by necessary inference provided that the rule as to marshalling is not to apply, or that the mortgage debts are to be paid in priority to the pecuniary legatees, or that the devisees of the mortgaged realty are to be considered as legatees to the extent of the mortgages, so as to share rateably with the pecuniary legatees

(1) 4 Hare, 94. (2) 14 W. R. 1011.

in case of deficiency of the residuary estate. I ought to say a few words about the case of *Smith* v. *Smith*. (1) Speaking with all respect, I cannot follow the grounds on which that case was decided. It seems to have been decided, and especially on appeal, on the ground that the will there negatived (as it no doubt did, as the law then stood) the application of Locke King's Act. But the Courts do not appear to have seen that, assuming Locke King's Act did not apply, the question of marshalling then arose, and ought, on the authorities I have referred to, to have been decided in favour of the pecuniary legatees. That case seems to me inconsistent with the English authorities, and if it is to be supported at all must be taken as a decision, on the wording of the will there in question, that the testator had by necessary implication negatived the application of the rule as to marshalling. Speaking for myself, I can only say that I should not have gathered from the provisions of that will that the testator had negatived the application of the rule. It follows, summing up the results of this judgment, that the order of payment of the various sums I have been dealing with must, in my opinion, be as follows: (1.) the four pecuniary legacies; (2.) the sum representing the price of the house sold; (3.) the mortgage debts; and (4.) the annual sums given to the sons out of residue.

Solicitors: *R. Oliver; Hughes, Hooker & Co.; Sole, Turner & Knight.*

(1) 10 Ir. Ch. Rep. 89, 461.

W. C. D.

ROMER J.

1899

Jan. 13.

In re JACK.
JACK *v.* JACK.

[1896 J. 1007.]

Will—Power of Appointment—Exercise of Power—One-third to Son of Donee of Power—One-sixth to each of two Daughters—No Appointment of remaining Two-sixths—"Wish them to pass directly to my said two Daughters"—Son not to share in "unappointed parts."

A testator bequeathed 15,000*l.* to trustees upon trust for J. B. for her life, and on her death in trust for her three children, H. B., J. W., and A. W., in such shares as J. B. should by will or codicil appoint, and in default of appointment in trust for her three children equally as tenants in common.

J. B., by a codicil to her will, appointed two-sixths of the fund in trust to pay the income to her son H. B. until he should assign, charge, or otherwise dispose thereof; and on such event happening, then in trust during his life, and after his death for his children (if any) as therein mentioned, and if no children in trust to be equally divided between all her children and grandchildren then living per capita; and she appointed one-sixth in trust for her daughter J. W. as therein mentioned, and one-sixth in trust for her daughter A. W. as therein mentioned, and declared as follows: "I make no appointment of the other two-sixth parts of the said sum of 15,000*l.*, as I wish them to pass directly to my said two daughters, so as to give them an immediate vested and disposable interest therein, and I also declare that neither my son nor his children (if any) shall take any share or interest in the said unappointed parts of the said trust funds":—

Held, that the last-mentioned two-sixth parts of the funds went as unappointed among the three children of J. B.

Summons for a declaration between whom a sum of 5000*l.* (part of a trust legacy of 15,000*l.* bequeathed by the above-named testator in favour of his sister Amelia Joanna Beaumont, deceased, for life, with remainder in favour of her three named children as she should by will or codicil appoint, with remainder in favour of such three named children equally) is now distributable, having regard to a third codicil executed by the said A. J. Beaumont in exercise of the aforesaid power.

Charles Jack, by his will dated November 15, 1888, bequeathed to trustees the sum of 15,000*l.* upon trust for investment and

to pay the income to his sister Amelia Joanna Beaumont for life for her separate use, and after her death to stand possessed of the said sum of 15,000*l.*, and the investments thereof, in trust for all or such one or more of Henry Keetley Beaumont, Catherine Joanna Beaumont (afterwards Catherine Joanna Wansbrough), and Amelia Ann Woolmer, the children of the said Amelia Joanna Beaumont, or their children then born or thereafter to be born, at such time or times and in such shares and manner as the said Amelia Joanna Beaumont should by will or codicil appoint, and in default of such appointment, and so far as any such appointment should not extend, in trust for the said Henry Keetley Beaumont, Catherine Joanna Wansbrough, and Amelia Ann Woolmer, in equal shares as tenants in common. The will did not contain any hotchpot clause affecting this bequest.

Amelia Joanna Beaumont made her will, dated August 12, 1895, and by a codicil thereto dated June 26, 1896, in exercise of the power contained in the above will, and of every or any other power in that behalf her enabling, appointed and declared that the trustees or trustee for the time being of the will of the said Charles Jack should stand possessed of the sum of 5000*l.* (being two equal sixth parts of the said sum of 15,000*l.*), in trust to pay the income thereof to the said H. K. Beaumont until he should assign, charge, or otherwise dispose thereof or some part thereof, or become bankrupt, or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become vested in some other person (whichever of the said events should first happen); and if the trust thereinbefore declared should determine in the lifetime of the said H. K. Beaumont, then in trust during the remainder of his life to pay and apply the income for his maintenance and support, or otherwise for the benefit of him and his issue for the time being (if any), and if he should for the time being have no issue, then for the benefit of all or such one or more exclusively of the others or other of her son and daughters and grandchildren for the time being in such manner as the said trustees or trustee should in their discretion think fit; and after the death of her said son, then in trust for all his children who

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being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares, and if but one such child, then the whole for that child; but if there should be no children who should attain a vested interest in the 5000*l.*, then she directed that the trustees should hold the same upon trust for and to be equally divided between all her children and grandchildren then living per capita who being male should attain twenty-one, or being female should attain that age or marry.

And she further appointed and declared that the said trustees or trustee should stand possessed of the sum of 2500*l.* (being one equal sixth part of the said sum of 15,000*l.*) in trust to pay the income thereof to the said C. J. Wansbrough for life, and after her decease for all her children or child as therein mentioned, and that they should stand possessed of the sum of 2500*l.* (being another one equal sixth part of the said sum of 15,000*l.*) in trust for the said A. A. Woolmer for life, and upon her decease for her children or child as therein mentioned. And the said testatrix declared as follows: "I make no appointment of the other two-sixth parts of the said sum of 15,000*l.*, as I wish them to pass directly to my said two daughters, so as to give them an immediate vested and disposable interest therein, and I also declare that neither my son nor his children (if any) shall take any share or interest in the said unappointed parts of the said trust funds."

Farwell, Q.C., and *Underhill*, for the trustees.

Neville, Q.C., and *George Lawrence*, for the two daughters. There is an implied appointment to the two daughters in the last clause of the codicil of the remaining two-sixths of the fund, though there is no express appointment: *Foster* v. *Cautley* (1); but should the Court hold there is no implied appointment, then we submit that the appointment to the son in the first clause of the codicil is conditional upon his claiming no part of the unappointed fund.

Levett, Q.C., and *Hewitt*, for H. K. Beaumont. No doubt the testatrix acted under a mistake. She thought that if she

(1) (1855) 6 D. M. & G. 55.

did not appoint the remaining two-sixths of the fund they would go to her two daughters.

A power will not be held to be executed contrary to the express intention of the donee, although it is clear the appointor acted under a misapprehension: *Langslow* v. *Langslow* (1); *Carver* v. *Richards*. (2)

Edward Ford, for T. G. Jack, the heir-at-law of the testator Charles Jack.

Neville, Q.C., in reply.

ROMER J. I am very sorry that I do not see my way to hold in this case that the unappointed shares do not pass under the original will of Mr. Charles Jack as in default of appointment; but it appears to me impossible, in the first place, to say that under the codicil of Mrs. Beaumont she did in effect appoint the balance of the fund by implication, when she has expressly in the fourth clause of the codicil said that the balance is unappointed. I cannot get over that. It appears to me that she has acted under a mistake. She appears to have thought that if she did not appoint the balance of the fund it would go to the two daughters. As a matter of fact it does not; but that is a mistake that I cannot now rectify. Then it is said that I might see my way to putting the parties to an election. I cannot see how any question of election arises or could arise. Then, finally, it is said that I ought to hold that by the fourth clause, especially having regard to the declaration there made by Mrs. Beaumont, the original appointment in the first clause was to be subject to a condition that if the son claimed any share of the unappointed part of the trust fund the whole of the appointment in the first clause went.

Now there are certain considerations which appear to me to shew I ought not by implication to create a condition in this case where the testatrix has not in terms made a condition. It does not appear when I look at the first clause of the codicil, and see that she has given only a determinable life interest in the fund appointed to the son, and subject to that

(1) (1856) 21 Beav. 552. (2) (1859) 27 Beav. 488, 496.

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has appointed the fund for the benefit of the issue of the son—that is to say, the son's children—I cannot imply here with any fairness to these children a condition that if the son chose to make a claim to the unappointed part of the fund the children's interest should cease under that appointment. I cannot hold such a condition established in the case before me.

Under these circumstances, I can find no sufficient ground on which I can hold that the shares that remain unappointed do not pass as in default of appointment and go to the three children.

Solicitors: *Saxton & Morgan; Meredith, Roberts & Mills, for Baker, Sons, James & Lillington, Weston-super-Mare; Iliffe, Henley & Sweet; Surman & Quekett.*

G. M.

ROMER J.

1898

Dec. 15.

1899

Jan. 24.

In re AN ARBITRATION BETWEEN DAVID AND MATTHEWS.

Partnership Articles—Death of one Partner—Sale of Business to surviving Partner—"Effects and Securities"—Goodwill—Carrying on Business under Style of old Firm—Canvassing old Customers—Appraiser.

The law with regard to the disposal of goodwill on the dissolution of a partnership, and as to surviving or continuing partners' right to set up a rival business, discussed and explained.

L. and D. formerly carried on business as co-partners under the style of L. & D. On the death of L. in 1876 D. and M. entered into partnership under articles whereby it was provided that the style of the firm should be the same as before—namely, L. & D.; and (amongst other things) that "in case of the death of one of the partners a general account of the position shall be made, including all effects and securities of whatsoever nature that they possess, and the value of such effects and securities be estimated as at the date of such decease." There was also a provision for the appointment of an appraiser.

The partnership expired by the death of D. in 1896, whereupon an appraiser was agreed upon between D.'s personal representative and M., who subsequently appointed the same person arbitrator.

Questions arose before the arbitrator whether he ought to consider the question of goodwill and set a value thereon, and whether in considering the goodwill he should appraise the value thereof on the footing that, if it were sold, M. would be at liberty to carry on a rival business, but without any right to solicit customers of the old firm, and whether

or not under the name of L. & D. The arbitrator stated a special case for the opinion of the Court in accordance with s. 19 of the Arbitration Act, 1889:—

Held, that the arbitrator ought to consider the question of goodwill (if any), and to set such a value upon it as he might consider to have been attached to the business at the death of D., and that the value (if any) of the goodwill ought to be appraised on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit any person who was a customer of the old firm prior to the death of D., or the right to carry on business under the name of L. & D.

SPECIAL CASE for the opinion of the Court pursuant to s. 19 of the Arbitration Act, 1889.

M. Letricheux and Edmond David carried on business in Swansea as coal merchants and commission agents under the style or firm of Letricheux & David up to the death of Letricheux in December, 1876.

After Letricheux's death, Edmond David and Richard John Matthews entered into partnership under articles of partnership dated March 23, 1877, whereby it was provided that the partnership should be for a period of ten years, at the expiration of which period it might be renewed, and that the style of the firm should be the same as before, namely, "Letricheux & David."

Art. 8 provided that "in case of the death of one of the partners a general account of the position shall be made, including all effects and securities of whatsoever nature that they possess, and the value of such effects and securities be estimated as at the date of such decease. Two appraisers shall be appointed to fix the value of the effects and securities—one by the surviving partner, the other by the lawful heirs of the deceased; and if these two do not agree, they must appoint a third person, whose decision shall be final."

Art. 9 provided that "the portion decided upon as belonging to the heirs of the deceased partner cannot be withdrawn from the business before three years from the date of the said decease; but during this time the heirs shall have a right to half of the share of the profits which would have belonged to the deceased partner."

The partnership created by the articles of March 23, 1877,

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was continued and renewed, and expired upon the death intestate of Edmond David on March 11, 1896; and on his death it was agreed between his widow and administratrix, Louise David, and Richard John Matthews, that R. G. Cauker should act as sole appraiser under art. 8; and it was subsequently agreed between them that he should act as sole arbitrator under art. 10 of the partnership articles.

It was contended before the arbitrator on behalf of Louise David that the business had a goodwill, and that in estimating the value of the effects and securities belonging to the partnership he ought to set a value on the goodwill; and it was contended by Richard John Matthews that there was not any goodwill attached to the business, and that, even if there was any such goodwill, it was not a subject which ought to be valued by him.

Madame David tendered evidence as to whether or not it was the custom of the trade to value goodwill as between the representatives of a deceased partner and a surviving partner, and also as to the terms of the original partnership between Letricheux and Edmond David, and as to whether or not any payment in respect of goodwill was on the death of Letricheux made to his personal representatives by Edmond David, which evidence the arbitrator declined to receive.

The questions for the opinion of the Court were: (1.) whether under art. 8 the arbitrator ought to consider the question of goodwill, and set a value on the goodwill (if any) which he might consider to have been attached to the business at the death of Edmond David; (2.) whether or not in considering the question of goodwill he should appraise the value (if any) thereof on the footing that if it were sold Richard John Matthews would be at liberty to carry on a rival business, but without any right to solicit any person who was a customer of the old firm prior to the death of Edmond David to continue to deal with the said R. J. Matthews or not to deal with the purchaser; and whether or not he should appraise such value (if any) on the footing that if it were sold the said R. J. Matthews would not be entitled to carry on business under the name of Letricheux & David, or on what other footing he

should appraise such value (if any); (3.) whether he should have received any evidence as to the said alleged custom, or as to any and which of the matters mentioned above.

Farwell, Q.C., and *Napier*, for Madame Louise David.
Christopher James, for R. J. Matthews.

[The following cases were referred to in the course of the argument: *Jennings* v. *Jennings* (1); *Pearson* v. *Pearson* (2); *Gray* v. *Smith* (3); *Trego* v. *Hunt* (4); *Johnson* v. *Helleley* (5); *Page* v. *Ratliffe*. (6)]

Cur. adv. vult.

1899. Jan. 24. ROMER J. With regard to the first question submitted for my opinion, I do not think there is any real difficulty. Art. 8 of the partnership agreement constituted in substance a contract for sale of the partnership assets to the surviving partner. This being so, then on principle, and on the authorities cited, I am of opinion that as the goodwill formed part of the effects of the partnership at the death of Edmond David it ought to be valued. The authorities were so fully cited and discussed in the recent case of *Jennings* v. *Jennings* (1), before Stirling J., that I need not again review them. And, indeed, I do not suppose that the surviving partner, in the case before me, would admit that the share or interest of the deceased partner in the goodwill had not passed to him, bearing in mind what the effect of such an admission might be. I ought, perhaps, to add, with reference to an argument adduced to me based on the special provisions of art. 9 of the partnership agreement, that I cannot gather from that article that the share of profits payable to the representatives of the deceased partner was given in lieu or payment of that partner's share of goodwill. The more natural inference is that the share of profits was given in lieu of interest on the deceased partner's portion allowed to remain in the business.

(1) [1898] 1 Ch. 378.
(2) (1884) 27 Ch. D. 145.
(3) (1889) 43 Ch. D. 208.
(4) [1896] A. C. 7.
(5) (1864) 34 Beav. 63; 2 D. J. & S. 446.
(6) (1896) 75 L. T. 371.

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With regard to the second question, I feel more difficulty. I think that the goodwill ought to be valued on the footing of the consideration of what its value would have been to the partnership if there had been no contract between the partners that the surviving partner should purchase the share of the deceased partner in the partnership effects and securities, and therefore on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but also I think on the footing that he could not use the name of the partnership firm of Letricheux & David, and would not have the right to solicit the old customers of the firm. I will take the case of a partnership of the ordinary kind determined by the death of one partner, and will consider what the rights of the deceased partner would be. The goodwill of the business would be an asset, and might well be the most valuable asset of the partnership. The executors, therefore, in the absence of special provisions in the partnership contract, would be entitled to require that the goodwill should be sold together with the other assets for the purposes of division between the executors and the surviving partner; if the surviving partner refused to carry out this implied contract, then the executors could by an action in the Chancery Division obtain an order for the sale of the goodwill under the direction of the Court. This is now well settled, though at one time it was considered and had been decided (see *Hammond* v. *Douglas*) (1) that the goodwill survived for the benefit of the living partner. And in the meantime, pending the sale, I think the surviving partner would not be allowed to appropriate to himself the goodwill which belonged to the partnership: see, for example, the case of *Turner* v. *Major*. (2) In that case, which was one of dissolution by agreement between living partners, there was a special agreement that the goodwill should be sold. But I can see no difference in principle, as far as concerns the point I am now dealing with, between a special contract that the goodwill should be sold, and the contract implied by the Court in ordinary cases of partnership: see also *Taylor* v. *Neate*. (3) In

(1) (1800) 5 Ves. 539. (2) (1862) 3 Giff. 442.
(3) (1888) 39 Ch. D. 538.

the case of *Lewis* v. *Langdon* (1) there are some observations by Shadwell V.-C. which would seem to imply that he regarded a surviving partner as being under an obligation to the legal personal representatives of a deceased partner to preserve the goodwill; but those observations must, I think, be regarded as based on the above-mentioned case of *Hammond* v. *Douglas* (2), which at that time was probably regarded as representing the law on the subject of goodwill. If, then, it is not permissible for a surviving partner to appropriate to himself the goodwill of the partnership business, it follows that he ought not to do, and in case of necessity would be restrained by the Court, pending a sale of the goodwill for the benefit of the partnership, from doing any act in excess of his rights which, if not stopped, would enable him to obtain the goodwill or any part of it. For example, though a surviving partner is within his rights in carrying on a similar or rival business, he could, in my opinion, be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business. In saying this I am not considering special cases of difficulty which might arise if the name of the surviving partner was exactly the same as that of the partnership firm, and he was doing nothing else which might injure the goodwill beyond carrying on a similar business in his own name, but am only dealing with ordinary cases. With reference to certain cases which at first sight might appear to conflict with the view I have expressed, it will be found on examination that those cases, so far as not overruled, do not really conflict. I need not again refer to the cases of *Hammond* v. *Douglas* (2) and *Lewis* v. *Langdon* (1), or refer in detail to cases or observations in cases (as in *Robertson* v. *Quiddington*) (3) based on the erroneous supposition that *Hammond* v. *Douglas* (2) was a binding authority. As to the case of *Webster* v. *Webster* (4), that was not one where the executors of the deceased partner were seeking to protect the goodwill, but was an application by them to

(1) (1835) 7 Sim. 421, 425.
(2) 5 Ves. 539.
(3) (1860) 28 Beav. 529, 536.
(4) (1791) 3 Swans. 490, n.

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restrain the surviving partner from using the name of the firm based merely on the ground (obviously untenable) that thereby the estate of the deceased partner might be made liable. With regard to the case of *Banks* v. *Gibson* (1), it was one, according to the view of the judge who decided it, where co-partners had agreed on dissolution to divide the assets, including the goodwill, so as to allow either partner to use the name of the partnership firm. I know of no other case bearing on the point which calls for special comment. It is true that I cannot find any case directly establishing the right of the executors of a deceased partner in order to protect the goodwill to an injunction to restrain the surviving partner from carrying on business in the name of the partnership firm. But that is not extraordinary when it is considered that, up to comparatively recent times, it was considered that the right to the goodwill belonged to the surviving partner, and that it is only recently that the importance of goodwill and the necessity of preventing its improper appropriation have been fully recognised, and I may refer, as illustrating this, to the very recent important decision of the House of Lords in the case of *Trego* v. *Hunt*. (2) And bearing in mind that in ordinary cases of dissolution of partnership by death of one partner there is implied a right to have the goodwill sold, which would have to be carried out by an assignment of the goodwill to the purchaser, it is pertinent to refer to what James L.J. said in *Levy* v. *Walker* (3), that without any doubt on his part the assignment of the goodwill of a business conveyed the right to use the name of the business sold, and the exclusive right to use that name as between the vendor and purchaser of that business.

It further appears to me to follow that, in considering the value of the goodwill, it should be appraised on the footing that the surviving partner would not be at liberty to solicit the customers of the old firm; for if the goodwill had been sold in the ordinary way on the death, and had been assured to the purchaser, it is clear, since the case of *Trego* v. *Hunt* (2), that the surviving

(1) (1865) 34 Beav. 566. (2) [1896] A. C. 7.
(3) (1879) 10 Ch. D. 436, 448.

partner, who would have been one of the vendors, could not injure the goodwill sold by soliciting the customers of the old firm. And see the case of *Jennings* v. *Jennings* (1) above referred to. And while referring to that case I desire to add a few observations on the point mentioned by Stirling J. at pp. 389 and 390 of the report of that case which occasioned him some doubt. In cases of sale of a business by the Court for the purpose of winding up a partnership, it has been the practice to provide by the particulars of sale that the sale would not prevent the persons previously interested in the business, or their representatives, from carrying on a like business. But that provision is inserted whether the dissolution of partnership occurs by the death of a partner or in the lifetime of all the partners. Another reason of its insertion is to prevent a purchaser being misled into supposing that he is buying, or that the vendors are going to sell to him, anything beyond what would be implied by the law by an assignment of the goodwill of the business. See the observations of Turner and Knight Bruce L.JJ. in *Johnson* v. *Helleley*. (2) The provision is not intended to give any right to the partners or their representatives to appropriate to themselves the benefit of the goodwill which has to be sold. It merely points out, so as to prevent any mistake or misunderstanding, that the sale of the goodwill of the business does not in itself prevent vendors from carrying on a like business; but it does not provide, and is not intended to provide, that the like business may be carried on by the vendors in a manner incompatible with their position as vendors. For example, in case of a sale on dissolution between two living partners whose names differ from the name under which the partnership business had been carried on, the provision in question would not entitle either partner to carry on a like business in the partnership name so as to lead to the belief that the business was the same as, or a continuation of, the partnership business. And in the same way, in my opinion, the provision would not entitle one of the partner vendors to injure the goodwill sold by soliciting the customers of the partnership firm.

(1) [1898] 1 Ch. 378.

(2) 2 D. J. & S. 446, 448, 449.

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With regard to the case of *Pearson* v. *Pearson* (1), also referred to by Stirling J. in *Jennings* v. *Jennings* (2), if the whole of the agreement in question in that action be looked at and the circumstances under which it was entered into be considered, I think it is clear that the parties must have intended that the defendant should be authorized to carry on business in the same way as any stranger might do; and certainly that was the view that was taken by the Court of Appeal and upon which its decision was based.

Before parting with the case which I have now to decide, it appears to me that there is another and a shorter way of dealing with it which leads to the same conclusions as those above pointed out. By the partnership agreement Edmond David and R. J. Matthews contracted that the partnership assets, which would include the goodwill, should on the death of one be sold to the survivor. For the purpose of valuing the goodwill, no difference can properly be drawn between a contract to sell to one of the partners and a contract to sell to a stranger. If the partners had contracted that on the death of one the goodwill should be sold to a stranger, the stranger buying and taking an assignment of the goodwill would have been entitled to prevent the survivor of the partners from carrying on a like business in the name of the firm "Letricheux & David," and from soliciting the customers of the firm.

With regard to the third question submitted for the opinion of the Court, it is clear that the arbitrator was right in not receiving the evidence mentioned by him.

Solicitors: *Riddell, Vaizey & Smith, for W. Robinson Smith, Son & Lewis, Swansea; Paul E. Vanderpump & Eve, for Ingledew, Sons & Vanderpump, Swansea.*

(1) 27 Ch. D. 145. (2) [1898] 1 Ch. 378.

G. M.

ROMER J.
1899
Jan. 12;
Feb. 4.

In re DUNCAN.
TERRY *v.* SWEETING.

[1896 D. 253.]

Administration Action—Claim for Damages for Misrepresentation—Wrongful act done by Deceased Person—Benefit to his Estate—Unliquidated Damages —"Actio personalis moritur cum personâ."

The purchaser from a testator of certain worthless shares in a limited company claimed to be entitled to prove in an administration action for damages for misrepresentation against the testator's estate, and assessed his damages at 250*l.*, the price paid by him for the shares :—

Held, that where, as here, there was nothing among the assets of the deceased that at law or in equity belonged to the claimant, and the damages which had been done to him were unliquidated and uncertain, the executors of the wrongdoer could not be sued merely because his estate might have benefited by the wrong complained of; that the damages claimed were none the less unliquidated and uncertain from the fact that the claimant might be able to prove that the measure of his damages was the amount of the purchase-money paid for the shares, and that, for these reasons, the claim could not be allowed.

ADJOURNED SUMMONS.

The question raised by this application was, whether a claim, which in effect amounted to one for damages for misrepresentation, could be maintained against the estate of the wrongdoer.

In October, 1895, the applicant, Thomas Seddon, was induced by the above-named W. A. Duncan to purchase from him 500 1*l.* shares in the "La Bufa" Mexican Gold Mines Limited, upon representations made to him by Duncan that the company owned certain valuable gold mines in Mexico. Payment for these shares was made by means of two bills of exchange for 250*l.* each, drawn by Duncan upon Seddon, and duly accepted by him. Duncan parted with these bills to the Adelphi Bank, Limited, who claimed to be holders of the same for value in due course; the first bill matured in February, 1896, and was duly paid by Seddon.

The "La Bufa" Mexican Gold Mines Limited, was subsequently wound up, and, from the statement published by the official receiver, it appeared that the company never owned any

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gold mines at all, and practically had no assets; so that the shares were worthless.

Duncan died in 1896, and an order for the administration of his estate, at the instance of a creditor, was made in this action in November 1896; the defendants were the executors.

Seddon, who still held the 500 shares, now declined to pay the remaining bill of exchange, and claimed that Duncan at the time of his death, and his estate still was, justly and truly indebted to him in the sum of 250*l.* for money paid; and, in the alternative, he claimed the said sum of 250*l.* as damages for misrepresentation.

The master refused to allow these claims, on the ground that the acceptance of the shares formed a consideration, and that, according to the authorities, a claim for damages for misrepresentation could not be maintained after the death of the wrongdoer. This question was adjourned into Court.

Borthwick, for Seddon. The applicant was induced by the misrepresentation of Duncan to purchase these worthless shares, and his estate has had the purchase-money. Where the estate of the person who made the misrepresentation has derived no benefit thereby, an action will not lie against his executors; but where, as here, the wrong complained of has benefited the estate of the testator, his executors can be made liable, and the maxim "Actio personalis moritur cum personâ" does not apply: *Peek* v. *Gurney*. (1) The same view of the law is expressed in *Phillips* v. *Homfray*. (2) The estate has had the benefit of this purchase-money: therefore the claim can be maintained against the executors.

[ROMER J. How can I measure the amount of your damages?]

The value of the shares was nil, so that the measure of damage is the amount paid for the shares.

Levett, Q.C., and *F. Thompson*, for the defendants. The applicant can only sue for unliquidated damages; the maxim "Actio personalis moritur cum personâ" therefore applies; there is nothing among the assets of the deceased that in law or in

(1) (1873) L. R. 6 H. L. 377, 393. (2) (1883) 24 Ch. D. 439.

equity belong to the applicant. There has been no failure of consideration for these bills, Seddon still has the shares, and inasmuch as he did not return them, an action could be maintained against him on the unpaid bill, although the contract to purchase these shares was obtained by misrepresentation: *Archer* v. *Bamford.* (1) An action can only be maintained against the executors in cases where you could have brought assumpsit against the testator: the only action that could have been brought against this testator would have been one for damages for deceit. The master was right in disallowing this claim.

Borthwick, in reply. The estate is not entitled to retain the benefit of the 250*l.* paid on the first bill, and the defendants could not successfully sue on the second bill: the shares can be returned; Seddon ought to be allowed to repudiate the contract which was obtained by fraud.

Cur. adv. vult.

Feb. 4. ROMER J. It is important to bear in mind what is the nature of the claim at present before me. It is a claim to prove for damages suffered by the claimant by reason of his being induced by the misrepresentations of the testator to buy certain shares belonging to the testator in a limited company. It is not a claim for rescission of contract. The claimant has retained and still retains the shares, and, so far as appears, he has never repudiated the contract, either during the testator's lifetime or since. Notwithstanding the lapse of time and change of circumstances, it is conceivably possible, though not very probable, that even now the claimant may be in a position to repudiate the contract, and on that footing recover back from the testator's estate the contract price. But I am satisfied that a claim of that kind was not the one which was made before the master, or adjourned to me for decision, or which the respondents, the executors, were, or are now, called upon or prepared to meet. It is true that, in his affidavit in support of his claim, the claimant speaks of the consideration for the payment of the purchase price having wholly failed,

(1) (1822) 3 Stark. 175.

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but it is clear that what he means by that is, that the shares proved eventually to be worthless. And certainly the respondents were never fairly given to understand by the claimant that his claim was not one for damages, but was one based on an alleged right now to repudiate the contract. Otherwise they would have had the opportunity given to them, of which I am satisfied they would have availed themselves, of shewing that from the delay of the purchaser in repudiating the contract, or from the change of circumstances, he is not now in a position to establish a right to repudiate the contract. I therefore proceed to deal with the case as being at present one only for damages. But should the claimant desire to make a claim on the other footing, then I will give him an opportunity of doing so, reserving all questions of cost hitherto incurred. Dealing, then, solely with the claim for damages, I should point out that the claim is legally one for unliquidated damages, and not the less so because the claimant seeks to establish that the true measure of those damages is the full amount of the contract price. Now, can such a claim be brought against the legal personal representatives of the testator? I think not, for, in my opinion, the principle applies of "Actio personalis moritur cum personâ," the case not falling within any statutory or other exception to the rule. It was suggested that the case was excepted from the rule because the testator obtained from the claimant the price of the shares by reason of the fraudulent misrepresentation. But this suggestion is, in my judgment, based on a misapprehension of the principle on which the Court acts in these cases. If the claimant was suing, or was entitled to sue, on the footing that the price paid for the shares was still the claimant's property, then I agree that the rule does not apply. See *Phillips* v. *Homfray* (1), where the limits of the rule are examined. On the other hand, if the claimant can only sue for unliquidated damages, then the rule applies. See *Kirk* v. *Todd* (2), where Jessel M.R. observes: "As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could only recover

(1) 24 Ch. D. 439. (2) (1882) 21 Ch. D. 484, 488.

unliquidated damages." And see the judgment of the majority of the Court of Appeal as delivered by Bowen L.J. in *Phillips* v. *Homfray* (1), where he states: "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby."

The question, then, that I have to consider in the case before me, narrows itself to this: Can the claimant while retaining the shares purchased, and while not in a position to insist upon repudiation of his contract under which he purchased the shares, sue for the purchase-money at law as remaining his own property by reason of the fraud which induced the contract? In my opinion he clearly could not. See, for example, the judgments in *Campbell* v. *Fleming* (2), where it is pointed out that, in such a case, the purchaser, to be able to sue for the purchase-money, must at the time of discovering the fraud elect to repudiate the transaction. If for any reason the

(1) 24 Ch. D. 454. (2) (1834) 1 Ad. & E. 40.

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purchaser is not entitled to insist on rescission of the contract, he cannot sue for the purchase-money, and can only sue for damages in an action of deceit: see *Clarke* v. *Dickson*. (1) In the case before me, as already pointed out, the claim has not to be treated as one for rescission. It is in fact at present a claim for damages for the deceit, and, as already pointed out, is legally one for unliquidated damages. It is a fallacy for the claimant to suppose that his claim becomes less one for unliquidated damages because he hopes to establish that the measure of his damages is the contract price he paid. Still less can he say, if he is not in a position to insist on rescission of his contract, that the purchase price he paid is his property because it equals the amount of damage he has sustained.

Solicitors: *Oldman, Clabburn & Co., for F. W. Adamson, Hull; Wynne, Holme & Wynne, for W. E. Mawdsley, Southport.*

(1) (1858) E. B. & E. 148.

W. C. D.

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BYRNE J.

1898

Nov. 1, 2, 3, 12.

[1897 D. 1213.]

Practice—Separate Causes of Action—Same Defendants—Joinder of Plaintiffs—Rules of Supreme Court, Order XVI., *r.* 1—*Company—Prospectus—Untrue Statements—Repudiation after Action brought—Reasonable Public Notice—The Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1 (*c*).

Four persons, each of whom separately took debentures on the faith of the statements in a prospectus and covering letter issued by the directors of a company, joined as co-plaintiffs in an action against the directors, claiming damages for misrepresentations contained in the prospectus and covering letter:—

Held, that, as the several causes of action were the same and arose out of the same transaction, and were against the same defendants, the action was properly constituted.

The Directors' Liability Act, 1890, s. 3, provides that where, after the passing of the Act, "a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, ... shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, ... unless it is proved . . . . that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent."

A director of a company, being aware that a prospectus was being issued to the public inviting subscriptions for debentures, did not trouble to read it, abstained from inquiry as to its contents, and refrained from giving any notice under the Act. On action brought against him for damages for untrue statements in the prospectus:—

Held, that after action brought it was too late for him to repudiate the prospectus, and that he was liable.

Semble, repudiation of a prospectus by statement of defence is not "reasonable public notice" within the meaning of the Act.

THIS was an action by Alfred Drincqbier, Auguste Drincqbier, S. Deveson, and S. V. Deveson against H. Wood and J. L. Wood, directors of a company, claiming damages for loss sustained by them by reason of untrue statements in a prospectus and covering letter on the faith of which they subscribed and paid for certain debentures.

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The statement of claim alleged that the defendants were during the whole of the transactions referred to the sole directors of a company registered under the Companies Acts, 1862 to 1890, and called the Wood's Patent Brick Syndicate Limited. That in or about the month of May, 1895, the defendants, as such directors, prepared and issued to the public a prospectus and covering letter inviting subscriptions for debentures of the said company to the amount of 1200*l.*, and that the defendants, in and after the month of July, 1895, with a view of inducing the plaintiffs to subscribe for some of the said debentures, delivered or caused to be delivered to the plaintiffs copies of the said prospectus and covering letter. That the said prospectus stated (amongst other things) as follows: "This company is formed to carry on the business of manufacturing bricks under Henry Wood's Patent Process. . . . and this company has acquired by agreement the patent rights for the United Kingdom. A site has been acquired at Angel Road, Edmonton, where a siding has been laid capable of accommodating 20 waggons"; and after giving figures shewing the estimated annual profit of the company as 3000*l.*, the prospectus proceeded as follows: "The above result is obtainable by working the patent upon one site only at Edmonton. It is, however, proposed to work other fields in suitable centres throughout the United Kingdom, either directly or through the medium of subsidiary companies. Applications have already been received for the formation of subsidiary companies. All subsidiary companies will have to make terms with this company for the use of the patent, and the profits of the company will thereby be substantially increased. The following contracts have been entered into with Mr. J. L. Wood to purchase the land at Edmonton to be paid by the royalty on the sand disposed of."

That the said covering letter contained (amongst others) the following statement: "As the assets of the company include the freehold land, machinery, buildings, and patent rights it will be seen that there is abundant security for the debenture-holders."

That the plaintiffs, upon the faith of the said prospectus and

covering letter, and believing the several statements above mentioned to be true, subscribed for debentures of the said company to the amount of 350*l.*, and duly paid for the same.

That the plaintiffs had recently discovered, and it was the fact, that the said statements were (as the defendants well knew) untrue in every particular.

That the said company had totally failed, and that on realization of its assets there would be little or nothing left for division amongst the debenture-holders. And the plaintiffs claimed damages according.

The defendant H. Wood put in no defence; but the defendant J. L. Wood, by his statement of defence, denied all the allegations in the statement of claim. Issue was joined, and the action now came on for trial against the defendant J. L. Wood, and on motion for judgment against the defendant H. Wood.

Eve, Q.C., and *Beddall*, for the defendants. There is a preliminary objection. Assuming each of plaintiffs has a good cause of action against the defendants, the separate claims of the plaintiffs ought not to be joined in one action.

Order XVI., r. 1, in the form to which it was altered in 1896, only allows several persons to be joined in one action where their right to relief is "in respect of or arising out of the same transaction or series of transactions," and where "if such persons brought separate actions any common question of law or fact would arise." In the present case a separate contract was entered into with each plaintiff, and there was a separate issue of the prospectus to each of them. It is true that each copy of the prospectus contained the same statement; but one plaintiff may have acted on one statement, and other plaintiffs have been induced to contract on the faith of other statements. And the defences available against the various plaintiffs may be totally different.

[They referred to *Smurthwaite* v. *Hannay* (1); *Stroud* v. *Lawson* (2); *Carter* v. *Rigby & Co.* (3); *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima.* (4)]

(1) [1894] A. C. 494.
(2) [1898] 2 Q. B. 44.
(3) [1896] 2 Q. B. 113.
(4) [1895] A. C. 661.

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Astbury, Q.C., and *George Cave*, for the plaintiffs. The plaintiffs are rightly joined in one action. It is true that each entered into a separate contract; but what in each case induced the plaintiff to enter into his contract was the prospectus which forms a common feature of the plaintiffs' cases. What each plaintiff sues for is damages caused by the misrepresentations contained in the prospectus, which arise out of the same transaction in respect of which each plaintiff's right to relief arises. If a traction-engine, negligently worked, causes damage to ten different owners of houses in a terrace, each has a separate cause of action, but all may sue together, subject to any order under the rule on the ground of embarrassment, in respect of the act which is common to all the cases.

In *Stroud* v. *Lawson* (1) it was held that the causes of action did not arise out of the same transaction or series of transactions, and that the plaintiff was suing in respect of one cause of action in a different capacity from that in which he sued in respect of the other cause of action.

[They also referred to *Arnison* v. *Smith*. (2)]

Eve, Q.C., in reply.

BYRNE J. I think, although there is some difficulty, that the action is properly brought. [His Lordship referred to Order XVI., r. 1, and continued:—]

Prior to this order being made there had been certain decisions, notably *Smurthwaite* v. *Hannay* (3), in which it was held that the old Order XVI., r. 1, dealt merely with the parties to an action, and had no reference to joinder of several causes of action, and that where the causes of action of several parties were separate and distinct, the same could not be joined in one action. Since the new order has come into operation one case has been decided by the Court of Appeal, namely, *Stroud* v. *Lawson* (1), which assists in interpreting this rule. In that case the plaintiff commenced an action claiming damages from the directors of a company for inducing him by fraud to purchase shares in the company. In the same action he sought

(1) [1898] 2 Q. B. 44. (2) (1889) 40 Ch. D. 567; 41 Ch. D. 348.
(3) [1894] A. C. 494.

relief suing as in a representative capacity, not on the ground of fraud, but on the ground that the payment of dividends out of capital was ultra vires and illegal. In that case it was held that it did not come within Order XVI., r. 1, because it could not be said that the right to relief arose out of the same transaction or series of transactions. I have, therefore, to consider whether the plaintiffs in the present case allege causes of action arising out of the same transaction. If in the present case separate actions had been brought, there would be common questions of law and fact. It is perfectly true that if these plaintiffs had not entered into contracts they could not have a title to relief. The entering into the contract was a separate transaction. All the plaintiffs allege the right to relief to arise out of the issue of the prospectus containing false statements, and therefore out of the same transaction. I do not consider that the word "transaction" in the rule necessarily implies something taking place between two parties as, e.g., where a collision between two ships causes damage, or houses are shaken down by a traction-engine passing along a highway; it is perfectly true that to establish their respective rights to relief the plaintiffs must prove their title on distinct evidence. But when each plaintiff has proved his title there is a common ground of action, namely, the loss to the plaintiffs caused by the defendants issuing the prospectus. I think, therefore, that the present case does come within the meaning of the rule, and that the defendants are not entitled to say that the plaintiffs must proceed in separate actions. The latter part of the rule provides for the prevention of injustice being done if the defendants are embarrassed by joinder of plaintiffs. In the illustration suggested of injury done to a terrace of ten houses by the illegal use of a traction-engine passing in front of them each owner would have to prove the title to his house, but the other questions of fact and law would be common to all the owners, and I have no doubt that they could all sue in one action.

The hearing of the case then proceeded, and the evidence is sufficiently noticed in the arguments and judgment.

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Astbury, Q.C., and *George Cave*, for the plaintiffs. As against the defendant H. Wood we are entitled to judgment. As to the defendant J. L. Wood, he is liable under the Directors' Liability Act, 1890, s. 3. He was a director at the time of the issuing of the prospectus and covering letter. The plaintiffs subscribed for debentures on the faith of the prospectus and covering letter, and were deceived by statements therein. Even if J. L. Wood did not authorize or consent to the issue of the prospectus, he has not given notice as required by the Act that it was issued without his knowledge or consent.

Eve, Q.C., and *Beddall*, for the defendant J. L. Wood. The defendant was no party to the issue of the prospectus or covering letter. He never authorized or consented to the issue of either document. Assuming that he knew the documents were issued, if he did not authorize their issue and did not know their contents, he was not bound to find out what the documents which were issued stated, and give public notice under s. 3 that they were issued without his consent or authority. It is not enough to fix a director that he knew a prospectus was issued unless he was aware of its contents; and he is certainly not liable where he is unaware until action brought that a prospectus has been issued. If the defendant knew of the prospectus, it is not suggested that he knew the covering letter had been issued, and the plaintiffs rely on that. The statement of defence is sufficient notice within s. 3.

Cave, in reply. It is unnecessary to bring home to J. L. Wood knowledge or notice of the issue of either document if it is shewn that he was a director when the document was issued. If he is a director at the time, he can only escape liability by giving the public notice required by the last paragraph of s. 3, sub-s. 1. The defence in the action is not sufficient. It is too late after action brought to give notice, and, moreover, the defence is not public notice. "What is reasonable public notice? Probably notice advertised in some of the principal newspapers in which the prospectus was advertised is sufficient": 1 Palmer's Company Precedents, 7th ed. p. 118.

Cur. adv. vult.

Nov. 12. BYRNE J. The plaintiffs claim compensation for loss or damage alleged to have been sustained by them by reason of untrue statements in a prospectus and covering circular on faith of which they took certain debentures. They ground their claim upon the provisions of the Directors' Liability Act, 1890. There are two defendants, H. Wood and J. L. Wood, who were at the date of the events giving rise to the claim the only directors of a company called "The Wood's Patent Brick Syndicate, Limited." The defendant H. Wood put in no defence, and against him the plaintiffs moved for judgment, and as the averments in the statement of claim are admitted, and are sufficient to entitle the plaintiffs to relief, there must be judgment in their favour, severally, for compensation for loss or damage sustained by reason of the untrue statements contained in the covering letter and prospectus in the statement of claim mentioned; and there must be an inquiry to ascertain the amount of loss or damage so severally sustained, and for payment to each of the plaintiffs of the amount which shall appear to be due to him. The plaintiffs are also entitled as against the defendant H. Wood to judgment for costs up to and including judgment, the subsequent cost being reserved with liberty to apply.

As against the plaintiff Auguste Drincqbier, counsel for the defendant J. L. Wood elected to call no evidence, and submits that no case has been made out. As against the remaining plaintiffs the defendant J. L. Wood has adduced evidence, and I must therefore consider the case of Auguste Drincqbier separately. By the provisions of the Directors' Liability Act, 1890, s. 3, sub-s. 1, it is provided that "where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice . . . . shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice," unless certain things are proved. For the purposes

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of the case, I have first to consider that portion of the Act which I have read. On January 3, 1895, the defendant J. L. Wood entered into an agreement with his brother, the defendant H. Wood, whereby he agreed as landlord to let and H. Wood agreed to take a piece of land at Angel Road, Edmonton, adjoining the Great Eastern Railway, for the term of one year certain from December 25, 1894, at the yearly rent of 50*l.* Clause 2 provides that the tenant (that is H. Wood) should be at liberty to dig and sell sand under the land, subject to his paying to the landlord for all sand so taken a certain royalty to be ascertained as the sand is dug. Clause 4 provides that the tenant shall be at liberty to use a siding connecting the land with the Great Eastern Railway for the purpose of conveyance of sand from the land, the tenant paying to the landlord for such right of user the yearly sum of 7*l.* 10*s.*, and exercising his right in accordance with an agreement between the landlord and the Great Eastern Railway Company dated December 4, 1894. Clause 5 provides that the tenant, if he shall give written notice to the landlord so to do at any time within the said year, by sending the same in a postage-prepaid envelope addressed to him at his address, may agree to purchase the fee simple of the said land at or for the price or sum of 1000*l.* plus interest thereon from December 25, 1894, at the rate of 5 per cent. per annum down to the completion of the purchase; and in the event of his so doing, he may pay the purchase-money either in one sum or more within the said year, or by instalments amounting in any one year to not less than 250*l.*, and in ascertaining the total amount paid in any one year by the tenant to the landlord, the amounts paid on account of purchase-money for rent under clause 1, and for royalties under clause 2, shall be included; the intention being that all rents and royalties (except any payment on account of the aforesaid 7*l.* 10*s.*) paid by the tenant to the landlord down to the final completion of the purchase shall be considered as payments on account of the said purchase-money. It is also provided that the tenant shall, in the event of his agreeing to purchase as aforesaid, be entitled to continue in possession of the property agreed to be let upon the terms pending the com-

pletion of the purchase. Clause 6 provides that if the tenant shall decide to purchase the said freehold reversion at the price of 1000*l.* as aforesaid, and shall pay to the landlord the purchase-money in manner hereinbefore provided, the landlord shall execute a proper conveyance of the premises to the tenant. There are certain other provisions in reference to title which it is not necessary to mention. On March 20, 1895, a company was registered under the title of "The Wood's Patent Brick Syndicate, Limited," with a memorandum and articles of association, which were signed by the defendant J. L. Wood; the remaining signatories being clerks and relatives of his or of his brother. Each signatory signed for one share only. The capital of the company was to be 5000*l.*, of which it was contemplated that the defendant H. Wood should hold shares to the amount of 4993*l.* On April 22, 1895, a meeting of the signatories to the memorandum was held at which the persons present were the defendants and Mrs. Wood, the wife of one of them, at which the defendants were appointed directors, H. Wood was appointed managing director, and one Arthur Thomas Collins, secretary, and then shares were allotted, namely, one share of 1*l.* fully paid up to each of the seven signatories, and 4993 of 1*l.* to H. Wood. The articles and memorandum were approved and accepted, "the contracts of the prospectus and articles" were agreed to, whatever that expression means, and a resolution was passed to issue 1200*l.* of debentures of 25*l.* each. Prior to May 24, 1895, a prospectus had been prepared, and a third proof was in print. It is headed "For private use only." It states the capital at 5000*l.*, divided into 5000 shares of 1*l.* each, gives the names of the two directors and of the secretary, and contains this passage: "A site has been acquired at Angel Road, Edmonton, where a siding has been allotted capable of accommodating twenty waggons. Machinery is being erected capable of making 20,000 bricks daily. The cost of the machinery, boiler, machine-erecting shed, and siding will be about 1500*l.* The whole of the shares will be kept by the vendor except seven as ordered by Act of Parliament." Then, after giving an estimate of anticipated profits from brick-making, the prospectus

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proceeds: "The above net profit is arrived at after paying all office and management expenses, rents, ground, &c. The above result is obtainable by working the patent upon one site only at Edmonton." A little further down is this statement: "The following contracts have been entered into with Mr. J. L. Wood to purchase the land at Edmonton, to be paid by the royalty on the sand disposed of." There is no enumeration or further identification of the contracts. The contract proceeds: "It is proposed to sell the sand off the estate, which is of exceptionally fine quality and worth about 3*s.* per yard on rail or in carts." Then follows an estimate of the value of the sand, and the prospectus concludes by stating, "These contracts, together with the memorandum and articles of association and specification of the patent, may be inspected at the offices of the company." At the same time a circular dated May, 1895, was in print, headed "Wood's Patent Brick Company, Limited. Issue of 1200*l.* debentures of 25*l.* each carrying 10 per cent. per annum payable quarterly, repayable in five years at 27*l.* 10*s.*" It commences, "Dear Sir,—You will find inclosed a prospectus of my Patent Brick Company, and I am pleased to offer you some debentures on the above terms." The following passages occur in this circular or letter: "I have patented the process and *purchased a field at Angel Road, Edmonton, to develop the business.*" And further on: "As the assets of the company include the freehold land, machinery, buildings, and patent rights, it will be seen that there is abundant security for the debenture-holders." The letter in question, although not signed, has a place left for signature, with the words under it, "Managing director." Armed with these two documents, the defendant H. Wood had an interview with the plaintiff Auguste Drincqbier, and shewed them to him. Auguste Drincqbier read them, and understood (as I think he was justified in understanding) that a freehold site had been actually acquired, and he believed the statements contained in the covering letter which I have referred to. He says he thought that "there was sufficient property to meet any loss—that was one reason he took debentures," and "he thought it such a good prospect that he could not possibly lose

money." He also says that, "if he had not been shewn the documents he should not have taken debentures," and that "nothing inconsistent with the letter or prospectus was said to him by H. Wood." No argument has been addressed to me, nor has it been suggested, that this prospectus and letter were not a prospectus and notice within the meaning of the Act. It is clear that, taken together, they invite persons to subscribe for debentures of a company; and in my opinion the prospectus alone, without the covering letter, contains an invitation to take debentures or debenture stock, if there should be any, because it is stated that "the whole of the shares will be *kept* by the vendor except seven as ordered by the Act of Parliament." It has not been contended that there was not an issue of the prospectus or of the notice within the meaning of the Act, and I am of opinion on the evidence that the plaintiff Auguste Drincqbier subscribed for the debentures which he ultimately took on the faith of the prospectus and covering letter. It is admitted that except such benefit as the company were entitled to under the agreement of January 3, 1895, they never acquired any land, machinery, or buildings, and that the option to purchase was never exercised. It is admitted that all the assets of the company have been disposed of, and that there will not be sufficient to repay the plaintiffs the principal amount due upon their debentures. The next question is, Are the statements to which I have referred untrue statements? I consider the statements in the covering letter as to the purchase of a field at Angel Road, as to the assets of the company including the freehold land, etc., and in the prospectus as to the site having been acquired, are in fact, by reason of non-disclosure of the real nature of the interest in the site, untrue; and, notwithstanding the curious and incomplete paragraph as to the contracts entered into with Mr. J. L. Wood, I think the plaintiff Auguste Drincqbier was justified in believing, and did believe, that a freehold site had been actually acquired, and that he was deceived. By the course which he has taken, the defendant J. L. Wood is precluded from availing himself of any of the provisions of the Act, proof of which might relieve him from responsibility for the issue

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of the prospectus and notice; and the one question which it remains for me to consider is whether Auguste Drincqbier, by reason of certain answers which he gave in cross-examination, re-examination, and to me, has not put himself out of court. [His Lordship then discussed some statements made by the plaintiff in giving evidence, and continued :—]

Auguste Drincqbier was an honest and truthful witness. There is a passage I should like to refer to in the judgment of the Lord Chancellor (Lord Halsbury) in *Arnison* v. *Smith* (1), where he says: "It is an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him as to each particular statement what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious, it assumes that a person who reads a prospectus and determines to take shares on the faith of it can appropriate among the different parts of it the effect produced by the whole. This can rarely be done even at the time, and for a shareholder thus to analyse his mental impressions after an interval of several years, so as to say which representation in particular induced him to take shares, is a thing all but impossible. A person reading the prospectus looks at it as a whole, he thinks the undertaking is a fine commercial speculation, he sees good names attached to it, he observes other points which he thinks favourable, and, on the whole, he forms his conclusion. You cannot weigh the elements by ounces." To my mind, it is very frequently an extremely difficult thing for a man who has taken shares or debentures upon the faith of a prospectus, on being asked, "Would you have taken the shares if something had been left out and something else put in?" to give a satisfactory answer, and probably in many cases his true answer would be, "I can hardly answer that question, as I never saw a prospectus with the statement you mention in it." In fact, Auguste Drincqbier took debentures on the faith of the prospectus and notice as he stated, and in my judgment he was influenced by statements contained in them which I have held to be untrue. I think his answers on cross-examination meant

(1) 41 Ch. D. 369.

that he placed more reliance on statements in the documents than on anything stated by H. Wood; and I have come to the conclusion that he is entitled to succeed.

In regard to the cases of the other plaintiffs, their evidence is not open to the criticism directed against that of Auguste Drincqbier. I am satisfied that each one of them took debentures on the faith of the prospectus and covering letter; but I have to consider the effect of the evidence adduced on behalf of the defendant J. L. Wood. The Act provides for the liability to which I have referred on the part of the directors, unless it is proved (amongst other things) that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent. The defendant J. L. Wood said in his examination-in-chief that he never authorized his brother or any one to use or make use of the documents or either of them, and that he never consented to their being used or issued. On cross-examination he admitted that, except putting the prospectus into the hands of his solicitor to defend the present action, he never did anything to repudiate his name being on it, or to repudiate any of the statements in it. He said he expected a prospectus would be drawn up, and that his brother and Collins mentioned it to him at the time of the issue of the debentures in 1895. Neither of them shewed it to him. They told him they were issuing a prospectus, and he said, "I did not ask to see a copy of the prospectus. I took no interest in the prospectus, and felt every confidence that whatever was done was done in a straightforward way." I am satisfied that the defendant J. L. Wood knew that there would be a prospectus, and that there was one in existence in or about July, 1895, at a time when debenture-holders were being sought for, and that, if his evidence is truthful as to his not having seen it before action, he chose to abstain from asking to see it. Two points have been submitted to me in reference to this matter, the one being that the Act uses the expression "the prospectus," and that "*the* prospectus" means the prospectus on the faith of which the debentures were taken—a construction

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of the Act with which I agree. And it is further said there might have been others. But no evidence was adduced or suggestion made, except in argument as a possibility, that any other prospectus was issued, although there is some little evidence (an inference from a printer's bill) tending to shew that an order for a further print, which, so far as I know, was in exact accordance with that proved to have been issued, was executed. But it is clear that the defendant J. L. Wood never "forthwith" nor even before action "on becoming aware of its issue gave reasonable public notice that it was so issued without his knowledge or consent, or that after the issue of the prospectus or notice, and before allotment, he, on becoming aware of any untrue statement therein, withdrew his consent thereto and caused reasonable public notice of such withdrawal and of the reason therefor to be given." I do not consider that a director, otherwise liable under the provisions of the Act, discharges himself of the burden thrown on him if he can do no more than shew that, having become aware of the issue of a prospectus or notice, he deliberately abstained from inquiring as to its contents and refrained from giving any notice. It may be that he can repudiate without inquiry as to the contents, and he certainly can take the more reasonable course, and one more consistent with his duty as a director and as an honest man, of endeavouring to ascertain what statements have been made for which he is responsible, and then, if he finds there are untrue statements publicly put forward, forthwith repudiate them. The truth is, as he admits, the defendant J. L. Wood had no pecuniary interest in the company beyond his interest as landlord and possible vendor under the agreement, and he was content to leave the preparation and issue of everything, including the prospectus and any notice they pleased to issue to get money, to his brother and Collins, trusting in them. He was not fully acquainted with the provisions of the Act. It should be understood that a director, consenting to be a director, has assumed a position involving duties which cannot be shirked by leaving everything to others.

The other point that was put forward was with reference to

the fact that it does not appear on a close examination of the evidence that the questions were directed to the covering letter, so that it is said it is not brought home to him that he knew of the issue of the covering letter. I think that it is extremely likely to be true that if he had asked to see the prospectus he would have seen the notice as well. Whether that be so or not, I think the statements in the prospectus as to the acquisition of the site to which I have referred are, under the circumstances of the case, having regard to what was not disclosed, in themselves untrue.

There is one other observation I should like to make before I conclude, and that is that whether I have taken the right view of the rule under which I allowed this case to go on or not, I am satisfied that in the present instance, so far from working injustice, I think that acting upon that view has saved expense to those parties by whom the expense of this litigation will have ultimately to be borne.

Under these circumstances, I hold that all the plaintiffs are entitled to succeed, and are entitled to judgment severally for the amount, on the proper inquiry being taken, which shall be found due to them. The result is the same as to all, and I think I need make no apportionment as to costs, as all the plaintiffs have appeared together and made common cause.

Solicitor for plaintiffs: *G. Willson, for Edwards & Willson, Ramsgate.*

Solicitor for defendants: *J. R. Pakeman.*

H. L. F.

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Nov. 8, 9;
Dec. 1.

In re GRIFFIN.
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[1897 G. 2347.]

Voluntary Gift—Equitable Assignment—Banker's Deposit Receipt—Indorsement and Delivery—Donee appointed Executor.

The indorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operate as a good equitable assignment of the amount on deposit at the bank; but, if anything be required to complete the gift, the appointment of the donee as executor of the donor perfects the gift.

THIS was an action which raised the question whether there had been a valid equitable assignment of a sum of money on deposit at a bank.

On November 11, 1878, Thomas Griffin, the testator, deposited a sum of 476*l.* 5*s.* 10*d.* with the Loughborough branch of the Leicestershire Banking Company, and took from the bank the usual deposit receipt for the amount "to account for here on demand." At the foot of the receipt was printed "No interest allowed unless the amount remains one month"; and in the margin was printed, "N.B. This receipt is not transferable, and will be required to be produced on each occasion of any withdrawal." At the back of the receipt was printed certain information respecting the bank, including the following statement: "Sums of 10*l.* and upwards are received on deposit at interest, and are repayable on demand without notice. For these sums receipts are granted called deposit receipts. These receipts are not transferable, nor can cheques be drawn against them. Parties may lodge money upon a deposit account who have no current account, and those who have current accounts may transfer any portion of their balance to a deposit account. If deposits are drawn within a month no interest is allowed."

The testator had two sons, Joseph and Thomas (the defendant). He made his will on August 10, 1872, whereby he constituted them his universal legatees, share and share alike, and appointed the defendant and two other persons (since

deceased) his executors. The testator died on November 26, 1886, without ever having withdrawn or (except as hereinafter mentioned) dealt with the amount deposited with the bank. His will was duly proved by the defendant.

The son Joseph died in the year 1881, leaving a widow (the plaintiff) and one child, who had now attained twenty-one. Joseph by his will appointed the plaintiff and two other persons (since deceased) executors of his will; and the plaintiff was now the sole executor of his will.

About a year before the testator's death, while he was living with the defendant, a conversation took place between them, the effect of which was that the defendant reminded his father that he had four children, while his brother's widow had only one, and said, "That old note: if you'll back it I could cash it." The father replied, "I will do that." The deposit receipt was then brought to the father, who indorsed it "Pay my son," and signed his name to the indorsement. The father then handed the document so indorsed to the defendant, saying, "Here you are, my lad. This is yours." The defendant took the deposit receipt, and retained it in his possession thenceforward until he received payment from the bank after his father's death of the amount of principal with accumulations of interest. No notice of the transaction was given to the bank until after the death of the testator; and, to avoid any dispute with the bank, the defendant gave them a receipt in the following form: "Received, T. Griffin, executor of Thomas Griffin deceased, but which sum I claim to be due to me in my own right and not in my official capacity as executor of my late father."

The plaintiff disputed the validity of the gift, and claimed, as executor of Joseph Griffin, to be paid one-half of the sum received by the defendant from the bank by virtue of the deposit receipt.

Eve, Q.C., and *Jason Smith*, for the plaintiff. A deposit note is not a negotiable instrument, and is not transferable. The indorsement, "Pay my son," was merely equivalent to an order to pay or a cheque, and was revoked by the death of the

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testator: *Moore* v. *Ulster Banking Co.* (1); *Hopkinson v. Forster* (2); *Schroeder* v. *Central Bank of London* (3); *M'Lean* v. *Clydesdale Banking Co.* (4) There was no notice to the bank until after the death of the testator. The transaction amounted only to an incomplete gift, which equity will not assist: *Richards* v. *Delbridge.* (5)

Astbury, Q.C., and *Ashton Cross*, for the defendant. The money on deposit was a debt owing to the testator by the bank, and the deposit receipt was an admission by the bank that they held this debt to his order. It was a chose in action, and assignable, and the restrictions on the deposit receipt cannot prevent the fund from being assignable, although they may prevent the document itself from being negotiable. On the evidence there was an absolute assignment of the debt made and perfected in the testator's lifetime: Judicature Act, 1873, s. 25; *Harding* v. *Harding* (6); *Knill* v. *Prowse* (7); *In re Dillon* (8); and notice given to the debtor after the death of assignor is sufficient: *In re Patrick* (9); *Walker* v. *Bradford Old Bank.* (10) Lastly, the intention to give continued until the death of the testator, and, if the gift was incomplete before, it was completed by the appointment of the defendant as executor: *Strong* v. *Bird.* (11) The case of *Moore* v. *Ulster Banking Co.* (1) is distinguishable.

Eve, Q.C., in reply.

Cur. adv. vult.

Dec. 1. BYRNE J., after stating the facts, continued:— The question to be determined is, whether the defendant is entitled to retain the amount received from the bank for his own benefit or is liable to account for it as part of the testator's estate. This depends upon whether there was or was not a complete gift or equitable assignment of the amount on deposit at the bank. For the plaintiff it is argued that the indorse-

(1) (1877) Ir. R. 11 C. L. 512.
(2) (1874) L. R. 19 Eq. 74.
(3) (1876) 34 L. T. 735.
(4) (1883) 9 App. Cas. 95.
(5) (1874) L. R. 18 Eq. 11.
(6) (1886) 17 Q. B. D. 442.
(7) (1884) 33 W. R. 163.
(8) (1890) 44 Ch. D. 76.
(9) [1891] 1 Ch. 82.
(10) (1884) 12 Q. B. D. 511.
(11) (1874) L. R. 18 Eq. 315.

ment on the back of the receipt was a mere authority to pay equivalent to a cheque or order to pay, which was revoked by the death of the donor before being acted upon, and that the transaction did not amount to a complete gift or equitable assignment; while for the defendant it is argued that there was a complete equitable assignment when the document indorsed was handed over to the defendant, or that, even if the gift was not then complete, it became so upon the death of the testator, when the defendant's appointment as executor took effect. The deposit receipt is clearly not a negotiable instrument, nor by the terms of the deposit could cheques be drawn against it. I think that the order to pay being indorsed on the back of the receipt sufficiently identifies the fund to be paid as being the fund referred to in the receipt. It does not, in my opinion, fall within the class of cases in which the direction has been held to be a mere mandate from a principal to his own agent to pay a debt out of a certain fund, which is revocable by death. It is addressed to the debtor or holder of the fund. The general principles relating to voluntary settlements and declarations of trust are clearly summarized in the judgment of Turner L.J. in the case of *Milroy* v. *Lord* (1), from which, for the purpose of the present case, I need only read a short passage (2): "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him." It is, I think, clear that the test is whether anything remains to be done by the donor, not by the donee: see *Fortescue* v. *Barnett* (3); *Donaldson* v. *Donaldson* (4); and the fact that notice was not given to the bank does not render the gift incomplete: see *In re Patrick* (5); although the omission to give notice might under some circumstances enable a better title to the subject-matter of the gift to arise in a third person. In the

(1) (1862) 4 D. F. & J. 264.
(2) Ibid. 274.
(3) (1834) 3 My. & K. 36, 43.
(4) (1854) Kay, 711, 719.
(5) [1891] 1 Ch. 82–87.

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present case the donor appears to me to have done everything required to be done by him necessary to transfer the debt or fund to the defendant. He gave an order to pay, indorsed on the document without the production of which the bank would not pay, and he handed over the document itself to his son, thereby putting it out of his own power to claim the money. It was not necessary to give notice to the bank, and, if it had been, it would devolve upon the donee and not upon the donor to give it. Had the defendant applied to the bank for payment they would have paid him upon production of the receipt and indorsement, subject to being satisfied of the genuineness of the signature to the indorsement. To operate as an equitable assignment no particular form of words is required in the document. An engagement or direction to pay out of a debt or fund a sum of money constitutes an equitable assignment, though it does not operate as an assignment of the whole debt: per Chitty L.J in *Durham Brothers* v. *Robertson* (1); and a direction to pay the whole debt constitutes an equitable assignment of the whole debt. I think, therefore, that the defendant is entitled to succeed upon this ground; but, even assuming the gift to have been otherwise incomplete, I think that, having regard to the reasoning upon which the decision of Sir George Jessel in the case of *Strong* v. *Bird* (2) is founded, it would be impossible to say that the operation of the appointment of the defendant as executor was not to complete the title, unless I were to reject at all events some part of such reasoning. The actual decision in *Strong* v. *Bird* (2) has been followed by Stirling J. in the case of *In re Applebee* (3), where the executor had not proved the will. I see no ground for saying that the reasoning in *Strong* v. *Bird* (2) is not applicable to the present case. In *Moore* v. *Ulster Banking Co.* (4) it was sought to make out that there had been an effectual transfer; but the attempt failed because the deposit note was not a negotiable instrument passing by indorsement, neither was it equivalent to an order or direction to pay. I must add, with reference to the evidence, that the only witness

(1) [1898] 1 Q. B. 765, 769.
(2) L. R. 18 Eq. 315.
(3) [1891] 3 Ch. 422.
(4) Ir. R. 11 C. L. 512.

in support of the claim was the son; and if I had not been quite satisfied as to the truth of what he said, corroborated as his evidence was by the documents, I might have required stricter evidence as to the illness of his wife, who was present during a part of the interview. But I am satisfied that he spoke the truth, and do not think it necessary to require further evidence. There is no absolute rule, in the case of a claim against the estate of a deceased person, as to corroboration being necessary.

Solicitors for plaintiff: *S. W. Johnson & Son, for Fisher, Jesson & Wilkins, Ashby-de-la-Zouch.*

Solicitors for defendant: *Kingsford, Dorman & Co., for Smith, Mammatt & Co., Ashby-de-la-Zouch.*

H. L. F.

WRIGHT J. 1899 Jan. 11, 12, 14.

In re AFRICAN GOLD CONCESSIONS AND DEVELOPMENT COMPANY.

MARKHAM AND DARTER'S CASE.

[0091 of 1897.]

Company—Shares issued as Fully Paid—Sufficiency of Filed Contract—Statement of Consideration—Certificates of Shares—Estoppel—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

In order to comply with s. 25 of the Companies Act, 1867, it is not necessary that within the four corners of the filed contract there should be a complete identification of the property other than cash which is the consideration given for the shares therein referred to, provided the filed contract states plainly the nature of the consideration, and supplies the means of identification by reference to an unfiled contract which contains a full description of the consideration.

Observations on *In re S. Frost & Co.*, [1898] 2 Ch. 556.

In 1892, O., M., and D. and another being the owners of mining rights in African land, all of them except O. gave O. a power of attorney authorizing him to sell their interests to a company to be formed to take over the property for fully paid shares. In 1894 the same persons handed the title deeds to a purchaser from O. In 1895 M. and D. received certificates of shares in the A. Company stating that the nominal amounts of the shares had been paid in full. They kept the certificates and obtained a dividend on the shares. In the meantime O. without their knowledge had formed the H. Syndicate to take over the property and resell it at an enhanced price to a trustee for the then intended and afterwards formed A. Company, which took over the property and issued the shares. M. and D. (without their knowledge) took their shares as nominees of the H. Syndicate.

Before the issue of the shares two contracts, dated December 12 and December 19, 1894, were filed with the Registrar of Joint Stock Companies. That of December 12 was between the syndicate as vendors and the A. Company, and provided for the issue of shares (including those of M. and D.) to be treated as fully paid up "as mentioned in an agreement dated December 6, 1894," and also provided that "in consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement." It also confirmed the prior agreement which had on December 6 been made between the syndicate and the trustee for the intended company, and fully identified the property, but which was never filed. The agreement of December 19 was between the

syndicate and the company; and thereby, in consideration of the syndicate agreeing to give the company immediate possession of "the lands and premises situate in the mining district of Millwood, in Cape Colony, of South Africa, more particularly mentioned and referred to in an agreement dated December 6, 1894, and made between" &c. (stating the names of the parties), the company agreed to allot to the syndicate or their nominees shares (including those of M. and D.) in the company which were to be deemed to be fully paid.

M. and D. knew nothing of any contracts having been filed until in the winding-up of the company the liquidator sought to have them declared the holders of shares on which nothing had been paid:—

Held, that although the contract of December 12 might not be sufficient to protect the shares under s. 25 of the Companies Act, 1867, the contract of December 19 was sufficient.

But *semble*, that if no sufficient contract within the Act of 1867 had been filed before the issue of the shares, the statement in the certificates that the shares issued to M. and D. were fully paid would not have estopped the company or its liquidator from (*a*) denying that the shares were fully paid in cash—because M. and D. knew they were to get vendors' shares not paid for in cash, and did not rely on the certificate as a statement that cash had been paid; or (*b*) denying the filing or sufficiency of a contract in respect of the shares.

Burkinshaw v. *Nicolls*, (1878) 3 App. Cas. 1004, *Parbury's Case*, [1896] 1 Ch. 100, and *Bloomenthal* v. *Ford*, [1897] A. C. 156, distinguished.

Semble, however, that if the filed contracts had been insufficient the case would have been one in which relief would properly have been granted under the Companies Act, 1898.

In the year 1892 C. F. Osborne, of Cape Town, had obtained a concession from the Cape Government of mining rights over a large district in South Africa, and H. W. Markham, W. S. Darter, and one Webster assisted him with working capital, the four of them being formed into a private syndicate called the Osborne Syndicate.

The members of the syndicate in November, 1892, gave Osborne a power of attorney to come over to England and sell the property to a company for cash or fully paid shares, or partly in cash and partly in fully paid shares, and to receive the consideration for the principals.

Osborne shortly afterwards left for England, and the other members of the syndicate saw him no more.

In 1895 the title deeds of the property were handed over to one Bass on his producing the power of attorney, and claiming to be the vendee of the property from Osborne. The members

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of the syndicate other than Osborne heard nothing more of the matter until 1894, when they were informed by solicitors in Cape Town that they had been instructed to form a company called the African Gold Concessions and Development Company, Limited (below called "the African Company"), and had caused a transfer of property to be made from the Osborne Syndicate to that company. The solicitors handed over to the three members of the syndicate certificates of shares in the African Company. Markham's and Darter's certificates were each for 1406 shares of 10*s.* each in the African Company. Markham's certificate stated that his shares were numbered 8439 to 9844 inclusive, and Darter's certificate stated that his shares were numbered 9845 to 11,250 inclusive. Each of the certificates contained the statement, "there has been paid up to this date in respect of each of such shares the sum of 10*s.*"

Markham and Darter kept their certificates, and in 1895 each of them received a dividend on the shares.

Paragraph 10 of Markham's first affidavit (referred to in the judgment below) was as follows: "I say, positively for myself and speaking to the best of my knowledge information and belief for the said W. S. Darter, another member of the Osborne Syndicate, that when we received and accepted the certificates and shares last mentioned we did so in the full and positive belief that the shares comprised in the said certificates were fully paid shares as stated in such certificates, and that no liability whatever attached to our holding the said shares or any of them, and I say positively that had we thought that any such liability existed or might exist we would not have accepted the said shares or any of them. In fact, neither I nor the said W. S. Darter ever agreed or covenanted to take shares in the above-mentioned company. We only received such shares as members of the said syndicate and as representing property to which, as members of the said syndicate, we were entitled. We had no knowledge of any fact touching the issue of the said shares which would prevent their being fully paid for all purposes, and we relied, and were justified in relying, on the terms of the said certificates by which the issuing company stated the said shares to be fully paid."

Paragraph 6 of Markham's second affidavit (also referred to in the judgment) was as follows:—

"6. With reference to the remaining paragraphs of the said B. Newstead [the liquidator in the winding-up of the African Company] I know nothing of the matters therein referred to save as to the concluding portion of paragraph 8, in which the said B. Newstead attempts to shew that the allottees of the shares mentioned in such paragraphs gave no valuable considerations for such shares. On the contrary, I say that the mining concessions referred to in paragraphs 2 and 7 of my former affidavit and belonging to such allottees which were sold by our attorney, the said C. F. Osborne, as mentioned in my said former affidavit, were of great value and had cost such allottees many thousands of pounds; that I and my co-allottees believed, and were justified in believing, that such shares were allotted to us respectively as fully paid in consideration of the allotting company getting the benefit of our claims, rights, and interests in and to the said concessions, which were of substantial value; and that if such mining concessions had fallen into the right hands, and had been properly worked and developed, it is my firm belief that the property would have become an exceedingly valuable one. . . . . I know nothing of the shares allotted to Mr. B. C. Bass and A. V. Coombs, but, speaking positively for myself, F. J. Webster and W. S. Darter I say, and the share certificates prove that not one of such shares was ever sold by either of us and we did not receive a shilling in respect of such shares or otherwise save the small sum mentioned in my affidavit as by way of dividend."

In the meantime Osborne, without the knowledge of the other members of the Osborne Syndicate, had formed a company in England called the Homtini Hydraulic Mines Syndicate, Limited (below called "the Homtini Syndicate"), to take over the property and sell it at a greatly enhanced price to a trustee for a company then intended and afterwards formed, namely, the African Company.

By an agreement in writing dated December 6, 1894, and made between the Homtini Syndicate, thereinafter called the vendors, and one Harris, as trustee for and on behalf of the then

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intended African Company, thereinafter called "the intended company," it was agreed, amongst other things, as follows:—

"1. The vendors shall sell, and the intended company shall purchase, all the estate, right, title and interest of the vendors, of, and in the premises known as Millwood, in the Cape Colony, of South Africa, consisting of 206½ acres or thereabouts, known as claims Nos. 2577 to 2596, and 50 alluvial claims situated within the prospecting area defined by resolution of Parliament dated 9th and 13th August, 1888, free of licence fees, subject to the provisions of the said resolution and to such of the regulations in force in the Millwood mining area as are not inconsistent therewith, together with the right to lead water from the Homtini river; also with all plant and mills, stamps, outhouses, machinery and other property belonging to the vendors on the said premises.

"2. As the consideration for the sale the said Henry Harris as trustee for the said intended company shall on or before the 15th day of December inst. allot to the vendors or as they may direct 22,500 fully paid shares of 10*s.* each in the said intended company to be numbered 8 to 22,507, both inclusive, and shall also allot to the vendors or as they may direct 277,493 shares of 10*s.* each in the said intended company to be numbered 22,508 to 300,000 both inclusive upon each of which said 277,493 shares the sum of 8*s.* shall be deemed to have been paid."

"9. The said intended company shall procure an agreement respecting the allotment of such shares to be duly filed in the joint stock registry and upon the adoption of this agreement by the said intended company the said Henry Harris shall be discharged from all liability hereunder."

This agreement was never filed with the Registrar of Joint Stock Companies.

An agreement in writing dated December 12, 1894, and made between the Homtini Syndicate (thereinafter called the vendors) and the African Company (thereinafter called the company) contained only the following clauses:—

"The company shall forthwith allot to the vendors or their nominee or nominees 22,500 fully paid shares of 10*s.* each in

the said company to be numbered 8 to 22,507 both inclusive, and shall allot to the vendors or as they may direct 277,493 shares of 10*s.* each in the said company to be numbered 22,508 to 300,000 both inclusive, upon each of which said shares the sum of 8*s.* shall be deemed to have been paid leaving a liability of 2*s.* per share only thereon as mentioned in an agreement dated the 6th day of December, 1894."

"In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed."

An agreement dated December 19, 1894, between the African Company and the Homtini Syndicate, contained only the following three clauses:—

"In consideration of the [syndicate] agreeing to give the [African Company] immediate possession of the lands and premises situate in the mining district of Millwood in Cape Colony of South Africa, more particularly mentioned and referred to in an agreement dated the 6th day of December, 1894, made between the said [syndicate] of the one part, and Henry Harris as trustee for the said [African Company] of the other part the said [African Company] shall forthwith allot to the said [syndicate] or to their nominee or nominees 22,500 fully paid shares of 10*s.* each in the said [African Company] to be numbered 8 to 22,507 both inclusive and for all purposes the said shares shall be deemed fully paid shares in the said company.

"2. The said [syndicate] shall with all possible expedition procure the lands and premises to become vested in the said [African Company] free from all incumbrances according to the law in force for the time being of the said mining district of Millwood.

"3. The said [syndicate] shall also with all possible despatch transfer and vest in the said [African Company] all the water rights and other easements upon the said property or appertaining thereto belonging to them or to their predecessor in title."

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The contracts of December 12 and December 19, 1894, were both filed with the Registrar of Joint Stock Companies before the shares of Markham and Darter were allotted to them, and these shares were allotted to them, although they did not know it, as nominees of the Homtini Syndicate.

The African Company about the end of 1896 passed special resolutions for the voluntary winding-up of the company and the appointment of a liquidator; and on April 29, 1897, an order was made, on the application of the liquidator, that he or any contributory should be at liberty from time to time to apply to the Court to determine any question arising in the winding-up, and to exercise in respect of the enforcing of calls or of any other matter all or any of the powers which the Court could or might exercise if the company was being wound up by the Court.

The names of Markham and Darter were at first placed on the list of contributories as those of fully paid shareholders; but on May 9, 1898, liberty was given to the liquidator to alter the register of shareholders and the list of contributories by stating that the 1406 shares of each of them were wholly unpaid.

In August, 1898, Markham and Darter took out a summons asking for an order against the liquidator that the applicants might be reinstated in the list of contributories and register of shareholders as fully paid-up shareholders. This application was adjourned into court and heard before Wright J. on January 11 and 12, 1899.

Buckley, Q.C., and *A. W. Rowden*, for the applicants. The first question is whether, having regard to *Parbury's Case* (1) and *Bloomenthal* v. *Ford* (2), and assuming the contracts filed were not sufficient to satisfy s. 25 of the Companies Act, 1867, the liquidator is or is not estopped from denying that either the shares were paid for in cash, or that a sufficient contract was filed before the shares were issued. The applicants say that he is so estopped. They did not know that a sufficient contract had not been filed, and they received certificates stating that the shares were fully paid. It was at one time

(1) [1896] 1 Ch. 100. (2) [1897] A. C. 156.

thought that only a transferee and not an original allottee could claim against a company the benefit of the doctrine of estoppel, and in *Burkinshaw* v. *Nicolls* (1) the person who succeeded on that ground was a transferee. But when that case was before the Court of Appeal, under the name of *In re British Farmers' Pure Linseed Cake Co.* (2), James L.J. laid down the doctrine as applying to companies in much wider terms. He says (3): "I think that the section . . . . does not in the slightest degree alter the general law of the land as to the effect of the conduct of or a representation by companies, or companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them or by the officers to whom they have intrusted the management of their affairs. . . . . A joint stock company has no statutory immunity from the consequences of its acts and representations." Vaughan Williams J. relied on that statement of the law in *Parbury's Case* (4), where he held that the company was estopped in the case of an original allottee who had taken shares the certificate for which stated that they were fully paid. In *Ex parte Bloomenthal* (5) Lindley L.J. says: "The doctrine sanctioned by the House of Lords in *Waterhouse* v. *Jamieson* (6) and in *Burkinshaw* v. *Nicolls* (1) was properly applied in *Parbury's Case* (4), although he was an allottee and not a transferee." In *Ex parte Bloomenthal* (5) the Court of Appeal, however, distinguished *Parbury's Case* (4) from the one before them; but on appeal the House of Lords in *Bloomenthal* v. *Ford* (7) again gave relief to an original allottee who was the holder of certificates that the shares were fully paid.

[WRIGHT J. But here the applicants knew that nothing had been paid, because they knew the shares were vendors' shares.]

The shares had been paid for if a sufficient contract had been filed. The certificate, it is true, does not say that the shares had been paid for in cash, any more than it was so said in

(1) 3 App. Cas. 1004.
(2) (1878) 7 Ch. D. 533.
(3) Ibid. 538.
(4) [1896] 1 Ch. 100.
(5) [1896] 2 Ch. 525, 532.
(6) (1870) L. R. 2 H. L., Sc. 29.
(7) [1897] A. C. 156.

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Burkinshaw v. *Nicolls* (1), where the only payment to the company was by a consideration other than cash. If such a consideration is given and a sufficient contract is filed there is a payment. As Lord Halsbury L.C. says in *Bloomenthal* v. *Ford* (2), "It cannot be denied that there are some circumstances under which shares, although in the possession and under the dominion and control of the company itself, are shares which have been fully paid up either by means of actual money or by means of such matters registered under the Companies Acts as would have made them fully paid shares. . . . There are one or two hypotheses on which they could be. One is the suggestion of vendors' shares" (3). And Lord Herschell says (4): "The learned judges in the Court below have overlooked the fact that a company might deal just as this company dealt with these shares, and in a manner consistent with every fact that exists in the present case, and that those shares might have been fully paid up. . . . For example, there is the case . . . . of shares which are allotted to the vendors or their nominees; very often the names of the nominees of some of these vendors' shares are not given for a considerable time afterwards. . . . There is nothing impossible in a vendor coming to the assistance of a company . . . . by allowing a certain number of his shares to be used for the purpose of raising a loan." Supposing the applicants did know that no cash had been paid for the shares, they did not need to cast about to see whether the contract had been filed, but were entitled to say that they relied on the company having done everything which was necessary to make the shares fully paid.

Burkinshaw v. *Nicolls* (1) shews that the doctrine of estoppel

(1) 3 App. Cas. 1004.

(2) [1897] A. C. 163.

(3) And in *Ooregum Gold Mining Company of India* v. *Roper*, [1892] A. C. 125, 134, Lord Halsbury L.C., referring to s. 25 of the Companies Act, 1867, says, "Two things are manifest in this provision. The share is to be held subject *to payment*, and the payment is to be *in cash*. The amount is to be paid and the whole amount to be paid *in cash*, and to me it appears, looking to the latter part of the section, whereby a contract made and filed may qualify and cut down the form of payment, and that it may be in goods or in value received in some form, instead of in cash, it must nevertheless be payment."—F. E.

(4) [1897] A. C. 169.

applies in the case of a consideration other than cash where payment could only be effected by registering a contract, and *Parbury's Case* (1) and *Bloomenthal* v. *Ford* (2) shew that the benefit of estoppel may be claimed by an allottee.

[WRIGHT J. referred to *Arnot's Case.* (3)]

There the person whom the liquidator wished to place on the list of contributories had never agreed to take the shares.

[WRIGHT J. also referred to *Ibbotson* v. *Ibbotson Brothers & Co.* (4), and *Carling's Case.* (5)]

The other question is whether a sufficient contract was filed before the shares were issued. The document of December 6 was not a contract at all—for it was entered into with a person purporting to be a trustee for a company which did not exist at all—but it states fully the consideration given for the shares. The document of December 12 was the first contract, and is filed. This contract only states the consideration by reference to the implied document of December 6, and therefore possibly does not comply with the requirements of s. 25 of the Companies Act, 1867, as defined by *In re Kharaskhoma Exploring and Prospecting Syndicate.* (6) But the contract of December 19, which was also filed, does state the nature of the consideration, and by reference to the document of December 6 supplies the means of identifying the property. The question what degree of particularity is required in the statement of the consideration was purposely left undecided in the *Kharaskhoma* case (6); but having regard to *In re S. Frost & Co.* (7), it is submitted that here the two filed contracts do, or one of them does, sufficiently state the consideration.

[They also referred to *In re Maynards, Limited.* (8)]

Jenkins, Q.C., and *R. J. Quin*, for the liquidator. The company is now solvent, and if the applicants are entitled to be placed on the list as fully paid shareholders, they will be entitled to dividends at the expense of other shareholders who have paid cash in respect of their shares. If the applicants

(1) [1896] 1 Ch. 100.
(2) [1897] A. C. 156.
(3) (1887) 36 Ch. D. 702.
(4) (1898) 14 Times L. R. 278.
(5) (1875) 1 Ch. D. 115.
(6) [1897] 2 Ch. 451.
(7) [1898] 2 Ch. 556.
(8) [1898] 1 Ch. 515.

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now apply for relief under the Companies Act, 1898, the liquidator is prepared to cry quits.

[*Buckley, Q.C.* We are not applying under the Act of 1898. We say we are fully paid shareholders and refuse the terms offered.]

The applicants are attempting to unduly extend the principle laid down in the authorities. *Parbury's Case* (1) and *Bloomenthal* v. *Ford* (2) are really decisions of fact, and here the facts are different. If the doctrine of estoppel applies here, there are hundreds of cases in which shareholders ought to have been declared free from liability. There is only estoppel if the person claiming the benefit of it did not know the facts. But the applicants knew that the shares were issued for a consideration other than cash. They contend, however, that as the certificates say the shares were fully paid, that amounts to a statement that a sufficient contract had been filed. But such a statement, if expressly made, would not create an estoppel which would prevent the statute from applying. The Act provides that it shall be an invariable preliminary condition that the capital which the share represents shall be paid up in cash unless there is a previously filed contract; the section declaring that payment shall be an attribute or condition of every share: per Lord Cairns L.C. in *Burkinshaw* v. *Nicolls*. (3) In no case has it been said that an actual representation that a contract has been filed estops the company as against an original allottee. There cannot be estoppel on a matter of law, or a warranty, binding the company, of the sufficiency of the filing. In order to claim the benefit of the estoppel the shareholder must have acted on the statement and altered his position for the worse. In *Burkinshaw* v. *Nicolls* (4) the transferee had paid money for the shares. The applicants have done nothing but received a dividend.

As to the second question, the two documents filed are not a sufficient contract within s. 25. They would mislead a person searching the file. It is difficult to say why the document of December 19 was filed. It did not represent the true

(1) [1896] 1 Ch. 100.
(2) [1897] A. C. 156.
(3) 3 App. Cas. 1016.
(4) Ibid. 1004.

facts, and left out part of the consideration. The whole contract was not stated in the filed documents.

Buckley, Q.C., in reply. If shares are applied for on the footing that no payment shall be made for them, that makes no difference, because the law says they must be paid for. In this case down to allotment there was no contractual relation; the applicants did not even know that the company had been incorporated. Then they got the fully paid certificates. Assume that the applicants knew no cash had been paid, is not the company estopped from denying that the only other sort of payment has taken place, namely, payment in kind covered by a filed contract? The liquidator says, "The applicants knew these were vendors' shares and were not paid for in cash." But in *Burkinshaw* v. *Nicolls* (1) the whole case was that the company was to get other property than money for the shares, and that it was represented that there was a filed contract. Lord Cairns says (2): "If a receipt is given for the money by the company and the share passes into the hands of a person who has given valuable consideration for it, and knows nothing about the fact that the payment has not really taken place, there is nothing whatever in this section which would in any way invalidate his title. . . . . He says, 'I bow to the words of the enactment. I have not in any way attempted to interfere with it, but I have taken, in the course of business, a share, in regard to which I have the representation of the company that that section has been complied with.'" That was the case of a transferee; but there is no difference now between a transferee and an allottee. The estoppel in either case is from denying that somehow the shares are fully paid. By the statute they may be paid for in cash, or in kind plus filed contract, and by estoppel they have been paid for in the latter way.

As to the second point, the Court of Appeal in the *Kharaskhoma* case (3) did not say what the contract was to contain or with what particularity the property was to be described. Romer J. in *In re S. Frost & Co.* (4) says that such

(1) 3 App. Cas. 1004.
(2) Ibid. 1017.
(3) [1897] 2 Ch. 451.
(4) [1898] 2 Ch. 556.

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particularity as the liquidator insists on is not required. Even if the filed agreements had said that "all" the mines of the vendors were the consideration, evidence would have been required to shew what and where the mines were.

Cur. adv. vult.

Jan. 14. WRIGHT J. This is an application by Mr. Markham and Mr. Darter, who are stated to be merchants trading at Cape Town, for a declaration that shares which they hold in the African Gold Concessions and Development Company, Limited, ought as against the liquidator of that company to be treated as fully paid. The facts may be very shortly stated. One Osborne was possessed in 1892 of certain lands and mining rights in South Africa. The applicants provided him with money for the purposes of development on the terms that they were to have a certain interest in the property. They gave Osborne a power of attorney authorizing him, so far as concerned their interest, to sell the property either for cash or for fully-paid shares in a company to be formed in England to take it over, and in 1894 they handed over the title deeds to a person who claimed them as vendee from Osborne. They knew nothing more about the matter until, in 1895, they received scrip and their certificates of shares in the company (which is now in liquidation) stating the shares to be fully paid. They kept the certificates and claimed and obtained a dividend on the shares. What Osborne had done, without their knowledge, was to form a syndicate called the Homtini Syndicate to take over the property and resell it at a greatly enhanced price to a trustee for an intended company which was afterwards formed and is the company now in liquidation, and which company did take over the property and issued the shares now in question. The shares issued to the applicants were issued to them as nominees of the Homtini Syndicate, but this fact was not known to the applicants. Before the issue of the shares two contracts were filed with the Registrar of Joint Stock Companies, one dated December 12, 1894, and the other dated December 19, 1894. The former of these is a contract between the Homtini Syndicate, as vendors, and the company, and it provides for the

allotment to the vendors or their nominees of 22,500 fully-paid shares of 10*s.* each, and 277,493 shares of 10*s.* each to be treated as paid to the extent of 8*s.* "as mentioned in an agreement dated the 6th day of December, 1894," and it proceeded as follows: "In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed." The agreement referred to in this first filed contract was, in fact, the agreement made on December 6 between the Homtini Syndicate and the trustee for the intended company, and it fully identified the property. The second filed contract is an agreement between the company and the Homtini Syndicate, and so far as material is as follows: "In consideration of the . . . . syndicate agreeing to give the . . . . company immediate possession of the lands and premises situate in the mining district of Millwood, in Cape Colony, of South Africa, more particularly mentioned and referred to in an agreement dated the 6th December, 1894, made between the . . . . syndicate of the one part and . . . . as trustee for the . . . . company of the other part, the said . . . . company shall forthwith allot to the said . . . . syndicate, or to their nominee or nominees, 22,500 fully paid shares of 10*s.* each in the said . . . . company to be numbered 8 to 22,507, both inclusive, and for all purposes the said shares shall be deemed fully paid shares in the said company." Another clause provides for the transfer of water rights by the syndicate to the company.

The earlier of these two filed contracts may not be sufficient for the purpose of s. 25 of the Companies Act, 1867, because there is no indication of the nature of the "premises" except the reference to an agreement, which is not identified except by a statement of the parties to it, or in any other manner except a date; but I express no opinion on this point. If the later contract is sufficient in form, I do not see that the earlier is material except in so far as it might lead to the conclusion that the later does not state the real contract as it stood when the shares were issued. No explanation is given of the omission from the later contract of the 277,493 partly paid shares; but I

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do not think that the existence of this discrepancy is of itself enough to justify such a conclusion. The real question is whether the second document filed satisfies the language of s. 25 : "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed," &c. In the present case there is in the documents of December 6 and 19 together a contract, or note, or memorandum in writing such as would satisfy the Statute of Frauds, but the filed contract might not have been sufficient by itself to identify the subject-matter without the aid of the previous agreement of December 6 to which it refers for identification. Is it necessary under s. 25 that there should be a complete identification within the four corners of the filed contract, or is it enough if the filed contract states plainly the nature of the consideration and supplies the means of identification as in the present case? The question is left open in the *Kharaskhoma* case (1), where the only statement of the consideration was a mention of an unfiled contract and the words "for the consideration therein mentioned," and there was, therefore, on the face of the filed contract, nothing to shew whether the consideration in the unfiled contract was cash or what else it was. All the Lords Justices reserved the consideration of the degree of particularity with which the consideration must be stated, but two of them appear to express an inclination of opinion that it may be enough to state the nature of the consideration. In *In re Maynards, Limited* (2), the filed contract stated the consideration merely by reciting that by a former agreement between the vendor and the company (which was not filed) it was "agreed that the vendor should sell and the company . . . . should purchase . . . . (*a*) the business and property mentioned in the first part of the schedule thereto, and (*b*) the leasehold hereditaments and tenancies, short particulars of which are set out in the second schedule thereto." Kekewich J. expressed an opinion (guarded by an observation that the point had not been fully argued) that this was sufficient, but without

(1) [1897] 2 Ch. 451. (2) [1898] 1 Ch. 515.

indicating what further degree of particularity was requisite. In *In re S. Frost & Co.* (1) the filed contract stated the consideration only by reciting that by a former agreement between the vendor and the company it had been agreed that "the vendor should sell and the company should purchase certain leasehold messuages, shops, and premises, and that he should grant to the company and the company would accept the lease of certain other premises, and that the vendor should sell and the company should purchase all the goodwill of the several businesses carried on by the vendor upon the same respective premises, together with all the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses as therein mentioned." Here there obviously was not without the aid of the unfiled contract or of parol evidence anything to identify the shops or premises; but Romer J. held the filed contract sufficient. He was apparently of opinion that the filed contract by itself would have satisfied the Statute of Frauds. However that may be, I do not think that Romer J. meant that a filed contract cannot be sufficient for the purposes of s. 25, unless it would, without the aid of the unfiled contract, satisfy the Statute of Frauds. On the contrary, I understand him to mean that if the real nature of the consideration is disclosed, that may be enough, although the details can be ascertained only by other evidence; and I adopt that view. I apprehend that the filed contract in the present case might, so far as the certainty of description is concerned, have been sufficient for the purposes of specific performance. See the cases collected in Fry on Specific Performance, ss. 325 et seq., and *Plant* v. *Bourne*. (2) I have come to the conclusion that in the present case the filed contract may be a contract in writing determining that the payment for the shares shall be otherwise than in cash, notwithstanding that evidence beyond the writing itself is necessary for complete identification, provided the writing clearly explains, as this one does, what is the nature of the consideration which is to be substituted for cash, and supplies the means of identification. It is true that the means of identification which are in this case supplied may not

(1) [1898] 2 Ch. 556. (2) [1897] 2 Ch. 281.

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be accessible to a person inspecting the filed contract. But neither would he in general be any the wiser if the filed contract described the particular properties by locality, name, and bounds. It seems to me to be enough if there is an enforceable contract in writing which states with reasonable plainness the nature of the consideration which is to be substituted for cash. Here the contract does contain such a statement; and it is enforceable, because it refers to a document which supplies all that is legally wanting for complete identification.

If this view is right, it is not necessary to determine the other and much more important question which was first argued; but in case I am wrong on the first point, it will be necessary to determine the other question, and I think that I ought to express an opinion upon it.

It is argued for the applicants that the statement in the certificates that the shares are fully paid estops the liquidator from denying both the fact of payment in cash and the sufficiency of the filed contract. As regards the fact of payment in cash, I think there cannot in this case be any estoppel. It is plain from Mr. Markham's affidavits (paragraph 10 of the earlier, and paragraph 6 of the later) that the applicants were fully aware that they might get and did get from the company vendors' shares which had not been paid for in cash, but which were to be treated as fully paid in lieu of cash, as the consideration for their interest in the properties sold, and that in accepting the shares they did not at all rely upon the statement in the certificates as importing that the shares had in fact been paid for in cash. They knew that they had not paid cash, and they cannot have supposed that the company was making them a present of shares which some one else had paid for in cash. This excludes the application of *Parbury's Case*. (1)

As regards the alleged estoppel against denial of sufficiency of a filed contract, I think there is no authority for it. It is not necessary to decide what would be the effect of an express representation by the certificate that a contract has been filed. Here there is no express representation that any contract has been filed. A contract has in fact been filed, though the certifi-

(1) [1896] 1 Ch. 100.

cate does not refer to it. It would be a strong thing to hold that a company, by a certificate stating that shares have been fully paid, warrants the sufficiency in law of a filed contract. Moreover, such a conclusion would, as it seems to me, nullify s. 25. The very object of the section is to deal with cases in which certificates represent shares to have been paid. If that representation creates an estoppel against denial of the filing or sufficiency of a contract, I do not see in what case the section can operate, unless the shareholder is foolish enough (in that view) to examine the file for himself.

It is said that the language of Lord Cairns in *Burkinshaw* v. *Nicolls* (1) is an authority in favour of the applicants' contention. I do not so understand his language. When he there speaks of a representation that s. 25 has been complied with, I understand him to mean complied with by payment in cash. Nor can I find in *Bloomenthal* v. *Ford* (2) any suggestion that there can be any other estoppel in such a case than an estoppel against denial of payment in cash or of power to issue the shares.

The result is that the application must be allowed, with costs. I will only add that, if I were compelled to hold this second filed contract insufficient, I should think that relief ought clearly to be granted under the Companies Act, 1898, unless the liquidator can shew that there has been fraud or other matter of objection affecting the applicants.

Solicitors for applicants: *Clayton, Sons & Fargus.*
Solicitors for liquidator: *Bird & Eldridges.*

(1) 3 App. Cas. 1004, 1017. (2) [1897] A. C. 156.

F. E.

WRIGHT J.

1899

Jan. 24.

In re MERCHANTS' FIRE OFFICE.

[00314 of 1897.]

Company — Winding-up — Private Examination — Subsequent Proceedings against Examinee — Inspection of Deposition — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies* (*Winding-up*) *Rule, Nov.*, 1895.

In December, 1897, in the winding-up of a company, D., one of its directors, was examined under s. 115 of the Companies Act, 1862. In March, 1898, the liquidator in the name of the company commenced an action against the directors, including D., for alleged misfeasances, and in this action interrogatories were administered for the examination of D. Before answering, D. applied in the winding-up for liberty to inspect and take an office copy of the deposition taken at his private examination. He had already put in a full defence to the statement of claim, and offered to give an undertaking to use his best endeavours to prevent the communication of the deposition to the other defendants, or their solicitors or counsel:—

Held, that leave to inspect and take a copy of the deposition ought to be granted.

THE Merchants' Fire Office, Limited, being in voluntary winding-up, an originating summons was issued by the liquidator for liberty to examine Duncan Davidson and other directors of the company, and also other persons, under s. 115 of the Companies Act, 1862, and Davidson was privately examined in December, 1897.

Having regard to the Companies (Winding-up) Rule, November, 1895, the depositions taken at the examination were not placed on the file of proceedings.

In March, 1898, the company, by its liquidator, commenced an action in the Chancery Division against Davidson and the other directors of the company in which it was sought to have them declared liable for alleged misfeasances, and in this action interrogatories were administered for the examination of Davidson. He and the other directors had put in separate defences to the action, and before answering the interrogatories Davidson wished to see the deposition taken at his private examination.

He accordingly applied by summons for an order giving him liberty to inspect the deposition taken at that examination, and to take an office copy thereof.

W. F. Hamilton, in support of the application. The applicant at his private examination answered on oath certain questions referring to matters which are the subject of the action, and before again answering on oath he naturally wishes to know precisely what he then said. By rule 11 of the Companies (Winding-up) Rules, 1892, all "depositions . . . and other proceedings in the High Court in a winding-up matter" to which the rules apply are to be kept on the file, and by rule 32 every person who had been a director of a company in winding-up was entitled to inspect the file and take copies of any document comprised therein, this rule being in substance copied from rule 58 of the General Order of November, 1862. In *In re Standard Gold Mining Co.* (1) Vaughan Williams J. held that these rules gave an absolute right to inspect and take copies of all depositions taken at a private examination.

In that case, in accordance with a practice which had grown up, the depositions had not been placed on the ordinary file; but it was held that they ought to have been there, that they must be treated as if they were there, and that the applicant was entitled to inspection. Shortly afterwards a new rule was made—the Companies (Winding-up) Rule, November, 1895—and this says that "the notes of the depositions of a person examined under s. 115 of the Companies Act, 1862 . . . . shall not be placed on the file of proceedings, or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the Court shall so direct, and the Court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom." The Court therefore has a discretion whether it will make the order for inspection.

In this case the order ought to be made. In *Ex parte Pratt* (2), a trustee in bankruptcy applied for an order on a

(1) [1895] 2 Ch. 545. (2) (1882) 21 Ch. D. 439.

WRIGHT J. 1899 MERCHANTS' FIRE OFFICE, *In re.*

creditor of the bankrupt for delivery of goods stated to be the subject of a fraudulent preference. The creditor asked for a copy of his deposition at his previous private examination, and the Court of Appeal, while holding that the Court had a discretion, said there was no reason why the creditor should not have a copy. In *In re Beall* (1) it seems to have been considered that the bankrupt or any creditor had a right under rule 12 of the Bankruptcy Rules, 1886, to inspect the deposition taken at a private examination.

The applicant ought in the action to be on an equality with the liquidator, who has free access to the depositions.

It is right to apply by ex parte summons.

[WRIGHT J. Yes—notice being given to the liquidator so that he may move to discharge the order.]

[Reference was also made to *In re London and Lancashire Paper Mills Co.* (2)]

Daniel Jones, for the liquidator. Inspection ought not to be allowed. There is now no absolute right in a director or creditor to inspect a deposition taken at a private examination.

[WRIGHT J. In bankruptcy proceedings, prior to *In re Beall* (1), it was thought there was no absolute right to inspect.]

Down to 1892 the practice in bankruptcy and in winding-up was the same: the depositions were considered private, and it was not the practice to file them, the reason being that the examination was held in order to obtain information for the trustee or liquidator so that he might decide whether he would commence proceedings. To allow inspection would often defeat the whole object of having a private examination. Such an examination "must be considered in the nature of a secret proceeding. It stands, both in bankruptcy and in a winding-up, on a footing which . . . . is not the footing on which cases are conducted which are by way of litigation between parties": *In re Greys Brewery Co.* (3) And the deposition is a privileged document, which will not be allowed to be inspected on an application for discovery of documents: *Learoyd* v. *Halifax*

(1) [1894] 2 Q. B. 135. (2) (1888) 57 L. J. (Ch.) 766.
(3) (1883) 25 Ch. D. 400, 403.

Joint Stock Banking Co. (1) *Ex parte Pratt* (2) only shews that there is a discretion in the Court, and that in that particular case the Court saw no reason why inspection should be refused. In *North Australian Territory Co.* v. *Goldsborough, Mort & Co.* (3) the defendants' application for leave to inspect depositions used by the plaintiffs in cross-examination was refused. No order for inspection ought to be made unless special grounds are shewn. Here there are several defendants, and it is thought undesirable that means should be afforded the defendants of concerting their answers to the interrogatories.

Hamilton, in reply. The defendants have already shewn what defences they mean to rely on. The applicant will give any undertaking which the Court may think necessary to prevent the depositions being used by the other defendants.

WRIGHT J. This is a case of considerable importance. Since the Companies (Winding-up) Rule, November, 1895, it seems to me that, generally speaking, depositions taken under s. 115 of the Companies Act, 1862, ought to be treated as private, and ought not to be shewn without some clear reason being given for it. I think the cases would be few in which it would be right to allow any one to inspect the depositions generally. A separate case ought to be made for the inspection of each deposition, although, of course, the same reason might be sufficient in the case of two or more depositions. Here there is only one application, which is by Mr. Davidson for liberty to see his own deposition. The reason is that an action has been brought against him and the other directors, in which an order has been made that he should answer certain interrogatories, and before doing so he is naturally desirous of knowing precisely what he said at his private examination. The examination was taken more than a year ago, and related to matters which occurred at a still earlier date, and on the occasion of his examination he had no opportunity of making any note or taking a copy of what he said. In fact, he would not, I presume, have been allowed to do so if he had wished.

(1) [1893] 1 Ch. 686. (2) 21 Ch. D. 439.
(3) [1893] 2 Ch. 381.

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It is obvious that primâ facie he ought to be allowed to see what he said. That was the view taken in 1882 in *Ex parte Pratt* (1) by Jessel M.R. and Brett and Cotton L.JJ., and in 1895 by Vaughan Williams J. in *In re Standard Gold Mining Co.* (2) I should have thought that, if that were all, it would be almost a matter of course to allow the applicant to see his deposition. I confess, however, that I was rather impressed with the argument on the other side. Of course it does not follow that because he is entitled to see his deposition he ought to be allowed to do so at any moment he may choose. And here it is said in substance that he ought not to be allowed to see his deposition until after he has put in his answers to the interrogatories. If he had not put in a defence, or had put in what might be called a blank defence to be filled up afterwards, I should be inclined to hold that the liberty to inspect ought to be postponed. But here the applicant has put in a defence to the action which does not appear in any way to be a blank defence, and under the circumstances he says that he is now entitled to see his deposition.

Then comes the further objection from the liquidator that the action has been brought against a number of directors each of whom has put in a separate defence and is being interrogated, and each of whom had previously been examined separately; that each of them is, therefore, very much in the dark as to what the others have said; and that there is more chance of the truth being arrived at and any falsehood detected if each of them has to answer the interrogatories before he sees what the others have said in their depositions. I feel there is very great force in that argument. In certain states of fact I am not sure that such an objection ought not to prevail, but I do not think that primâ facie it ought to do so, and I do not think it ought to prevail in the present case. If the applicant is primâ facie entitled to inspect his deposition, I do not think that the mere fact that he is charged with something in an action against himself and other persons ought to deprive him of his primâ facie right of inspection unless I can find a conspiracy to misrepresent the facts of the case. I do not see anything of the

(1) 21 Ch. D. 439. (2) [1895] 2 Ch. 545.

sort here, and I think I should be acting with too much suspicion if I held that none of the defendants should see their own depositions until all had answered the interrogatories. I think, therefore, that the applicant must be allowed to see his own deposition.

As the applicant has offered to give an undertaking to use his best endeavours to prevent the communication of the deposition to any other defendants or their solicitors or counsel, I think the undertaking may be accepted. The liquidator must pay the applicant's costs, and may retain the amount and his own costs out of the company's assets.

Solicitors for applicant: *Arnold Williams & Co.*

Solicitors for liquidator: *Murray, Hutchins, Stirling & Murray.*

F. E.

C. A.
1899
April 25.

JACKSON *v.* NORMANBY BRICK COMPANY.

[1897 J. 781.]

Practice—Buildings—Pulling down—Mandatory Injunction, Form of.

An injunction the effect of which is to require the performance of a certain act, such as the pulling down and removal of buildings, should now be made in a direct mandatory form, and not in the indirect form hitherto in use.

This was an original motion by the plaintiff for an order directing the defendants to pull down and remove kilns, chimneys, and buildings which had been erected by them since the commencement of the action on part of certain land comprised in a lease granted by the plaintiff to the defendants, or for such other order as might be necessary for giving effect to the declaration that had been made in the action.

The action was to restrain the defendants from building on the land contrary to the provisions of the lease. The Court of Appeal, on appeal from Kekewich J., had made a declaration that the defendants were not at liberty to build without the consent of the plaintiff, and gave the plaintiff liberty to apply for a mandatory injunction after the expiration of three months. The application was made by the present motion.

Renshaw, Q.C., and *P. B. Lambert*, for the plaintiff.

Warrington, Q.C., and *Howland Jackson*, for the defendants.

Lindley M.R. The plaintiff is entitled to an order in the terms of the notice of motion. The registrar has called our attention to the form in which orders of this kind have hitherto been made, namely, restraining the defendant from allowing the buildings to remain on the land; but in future it will be better for the Court to say in plain terms what it

means, and in direct words to order the buildings to be pulled down and removed. The order will therefore go.

RIGBY and COLLINS L.JJ. concurred. (1)

Solicitors: *Huntington & Leaf; Jackson, Jackson & Stothart, for Jackson & Jackson, Middlesborough.*

(1) It is somewhat remarkable that the Court has now for the first time had the courage to exercise in a direct form a branch of its jurisdiction which, for at least ninety-five years, it has been content to exercise in—as Lord Brougham, when Lord Chancellor, said in 1832—"a roundabout mode."

The first case in which a doubt seems to have been expressed as to whether the Court could make a decree or order in a direct mandatory form requiring the performance of a particular act, seems to be *Lane* v. *Newdigate*, (1804) 10 Ves. 192, where the plaintiff by his bill prayed that the defendant might be decreed to repair the banks, stop-gates and other works connected with a canal. There Lord Eldon, while admitting the jurisdiction of the Court to enforce the performance of a particular act, expressed a doubt whether it was according to the practice of the Court to order in specific terms that act to be done; but added, "I think I can direct it in terms, that will have that effect." His Lordship thereupon pronounced an order in the form given in the report. In *Blakemore* v. *Glamorganshire Canal Navigation*, (1832) 1 My. & K. 154, 184, which came first before Lord Lyndhurst and subsequently before Lord Brougham, Lord Brougham, adverting to the point raised by Lord Eldon, said: "I take leave to agree with Lord Lyndhurst in the opinion that if the Court has this jurisdiction"—of ordering a specific act to be done—"it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object, seems to cast a doubt upon the jurisdiction." Lord Brougham, however, in consequence of the difficulty felt by Lord Eldon in *Lane* v. *Newdigate*, declined, though, as he said, without denying the jurisdiction, to exercise it in that particular case.—G. I. F. C.

G. I. F. C.

C. A.
1899
Jan. 25;
Feb. 16.

In re WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY.

Company—Unauthorized Borrowing—Money applied in Payment of Debts of Company—Subrogation of Lender to Rights of Creditors—Secured Creditors.

A railway company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, A having priority over B and C, and B over C. They had issued the whole of these stocks, and had no other borrowing power. Not having the funds to pay a half-year's interest on the debenture stocks, they borrowed money from their bankers for the purpose, the bankers paying the interest warrants of the stockholders when presented to them. Soon after this had been done a judgment creditor of the company presented a petition under the Railway Companies Act, 1867, and a receiver was appointed under the petition. The receiver had in his hands moneys sufficient to pay the next half-year's interest due to the A stockholders and to pay in part the interest for the same half-year due to the B stockholders:—

Held, that the bankers were not entitled, in respect of the moneys advanced by them and applied in paying the interest due to the debenture stockholders, to the benefit of the securities and priorities of those stockholders or any of them, but that they were only entitled, so far as the moneys advanced had been applied in discharging legal debts or liabilities of the company, to stand in the same position as if the advance had been a valid one.

Where a company borrows money ultra vires, the lender, so far as the money is applied in the discharge of legal debts and liabilities of the company, is entitled to have the loan treated as valid, but he is not subrogated to any securities or priorities of the creditors who are paid by means of his money.

Decisions of Romer J., [1898] 2 Ch. 663; [1899] 1 Ch. 205, affirmed.

APPEAL against two decisions of Romer J. (1)

The above railway company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, to the extent of 175,000*l.* by A stock, 175,000*l.* by B stock, and 145,000*l.* by C stock. The A stock had priority as to both principal and interest over the B and C stocks, and the B stock had a similar priority over the C stock. In July, 1897, these borrowing powers were exhausted, the whole of the three classes of debenture stock having been created, and the com-

(1) [1898] 2 Ch. 663; [1899] 1 Ch. 205.

pany had no further power to borrow money. The company had not any funds to enable them to pay the half-year's interest which was about to become due on August 1 on the debenture stocks, and they applied to their bankers, the North and South Wales Bank, to advance them money for the purpose. This the bank consented to do, and the advance was made by their paying the interest-warrants to the stockholders when they presented them for payment. The total sum thus applied was 9672*l.*, of which 3850*l.* went to pay the interest due to the holders of A debenture stock, 3380*l.* to pay the interest on the B stock, and the residue to pay the interest on the C stock. On September 8, 1897, upon a petition under the Railway Companies Act, 1867, presented by the Great Central Railway Company, who were judgment creditors of the Wrexham Company, an order for the appointment of a receiver was made against that company. The receiver had in his hands enough money to pay a half-year's interest to the A stockholders and to leave some surplus for the B stockholders. The bank claimed, in the first instance, that, to the extent of the whole 9672*l.* which they had paid to the debenture stockholders, they should be subrogated to the rights of those stockholders, and should, out of any moneys in the hands of the receiver, be paid what they had advanced in priority to any payment to the debenture stockholders. Romer J. held that this claim was unfounded. The bank then claimed that, at any rate to the extent of the 3850*l.* paid to the A stockholders, they were entitled to stand in the shoes of those stockholders and to be paid in priority to any payment to the B and C stockholders out of any surplus remaining after paying the interest due to the A stockholders. Romer J. decided against this claim also. The bank appealed against both decisions.

Neville, Q.C., *Method*, and *Danckwerts*, for the appellants. It is contended (1.) that, so far as the moneys advanced by the bank were employed in discharging a legal liability of the railway company, the bank are entitled to stand in the place of the creditors whose debts were paid by means of those moneys; (2.) at any rate, so far as the money advanced by the bank

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was employed in paying the interest due to the holders of the A debenture stock, who have priority over all other claims against the company, the bank are entitled to be subrogated to their rights. The A stockholders would not have been paid at all, if the bank had not paid them.

[LINDLEY M.R. The principle of subrogation is that the person who pays off a debt is entitled to stand as against the debtor in the place of the creditor whom he pays. Does this apply as against secured creditors?]

In *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), the rights of other creditors were affected by the subrogation which was admitted. No doubt the doctrine of subrogation is founded upon a fiction which is supposed to do justice. The debtor has had the benefit of assets to which he had no title. It can make no difference to other persons if the money, the borrowing of which was unathorized, is put back where it came from. In every case the equity is founded on the non-existence of borrowing powers: *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (2); *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (3) Perhaps these cases do not go far enough for the appellants. But in *Baroness Wenlock* v. *River Dee Co.* (4) the right of a person who pays off a legal debt of a company which has no power to borrow money for the purpose was said by Fry L.J. (5) to be founded upon an imaginary assignment by the creditor of his claim against the company to the person who pays him. If the creditor thus paid held a security, it must be taken that he assigned his security, as well as his claim, to the person who paid him.

[LINDLEY M.R. referred to *In re Cork and Youghal Ry. Co.* (6); *In re German Mining Co.* (7)]

In *In re Cork and Youghal Ry. Co.* (6) it might, no doubt, be said that the claim of the lenders was admitted only as against the company; but in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (2) it was held that the bankers were

(1) (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857.
(2) 22 Ch. D. 61.
(3) (1885) 29 Ch. D. 902.
(4) (1887) 19 Q. B. D. 155.
(5) Ibid. 165.
(6) (1869) L. R. 4 Ch. 748.
(7) (1853) 4 D. M. & G. 19.

entitled to hold some deeds as a security, and that must have affected other creditors.

[LINDLEY M.R. There does not appear to be any case in which it was decided that the lender was entitled to the security held by the creditor whom he paid off.]

This is involved in the principle laid down by Fry L.J. in *Baroness Wenlock* v. *River Dee Co.* (1), and also in the judgment of Lord Blackburn in *Cunliffe, Brooks & Co.* v. *Blackburn Benefit Society.* (2)

[LINDLEY M.R. Can an assignment by the creditor of his rights be implied unless his claim is completely satisfied?]

There is a gratuitous payment of a debt of the company by a third person, and if that person is substituted for the creditor no one is injured; the company ought not to be allowed to retain the advantage of that payment so long as the rights can be adjusted without injury to them or to the creditor. While the company is a going concern, and the interest on the debenture stock is paid half-yearly, the holders of that stock have no claim against the company. If the interest for a half-year is paid gratuitously by a third person, why should he not be paid by the company instead of the creditor whom he has paid? At any rate, when the next half-year's interest becomes due, why should not the surplus in the receiver's hands, after paying the A stockholders, be paid to the bank? The holders of the B stock will not be injured; otherwise, they will gain an advantage by means of the money advanced by the bank. There is in the receiver's hands more than enough to pay the interest due to the holders of the A stock. If the creditor had notice that the company had no power to borrow money, it might reasonably be held that he assented to an assignment of his rights against the company to the person who paid him; it is only going one step further to say that notice is immaterial. The holder of debenture stock has a series of debts due to him by the company, and the bank have paid one of the series, and should be treated as assignees of that one.

F. Thompson, for some of the A and some of the C debenture stockholders. There was no bargain between the company and

(1) 19 Q. B. D. 165. (2) 9 App. Cas. 866.

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the bank that the bank should have the benefit of the security of the debenture stockholders, nor was there any such bargain between the bank and the debenture stockholders. The bank paid the interest only as agents of the company, and this can give them no right as against the holders of the stock. The result of giving the bank what they claim would be to put them in a better position than that in which they would have been if the company had had power legally to borrow the money. The doctrine of subrogation has never yet been carried to this extent. The proposition established by the authorities is this —that, although the contract to borrow money is invalid at law, yet, so far as the company has had the benefit of the money in paying valid debts, it may be considered to have adopted the contract, and, as the liability of the company has not been increased, the lender may be allowed to claim against the company to the extent to which his money has been applied in paying the company's valid debts. But the lender can obtain no higher right than if his contract had been a legal one. The contract is treated as binding in equity, and the company cannot repudiate their liability when the money has been applied in paying their debts. This is the principle of Lord Hatherley's judgment in *In re Cork and Youghal Ry. Co.* (1) —adoption of the contract by the company, or it may be more correct to say that the company are estopped as against the lender from saying that the transaction was not legal. In *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (2) Lord Selborne said (3): "The test is: has the transaction really added to the liabilities of the company?" He was evidently referring to an equity as against the company itself—not as against other creditors. In that case the bankers were held to be entitled, in respect of money advanced by them and applied in discharging debts of the society, to a lien upon deeds which had been deposited with them by the society; but the bankers were not allowed the benefit of the securities of creditors whom they had paid. *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (4) has no application to the present

(1) L. R. 4 Ch. 748.
(2) 22 Ch. D. 61.
(3) 22 Ch. D. 71.
(4) 29 Ch. D. 902.

case: no question of priority arose there. In *Baroness Wenlock* v. *River Dee Co.* (1) Fry L.J. said (2): "this equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice." If the fiction will not further justice, the Court should not adopt it. In this case the bank are seeking to extend the supposed contract beyond its terms.

Theobald, for holders of C debenture stock. No one but the bank says that the debt to them was invalid, and they say it was invalid in order that they may set up the right of subrogation. When the bank made the advance they expected that they would rank as simple contract creditors of the company, and now they claim to be treated as secured creditors. This equity which they set up is, at any rate, only an equity as against the company, that is, against the shareholders. The question has never in any previous case been raised as between different classes of creditors. In *In re German Mining Co.* (3) and in *In re Cork and Youghal Ry. Co.* (4) the doctrine was applied as between the company and the unauthorized lender, and it ought not to be extended further. There are expressions in some of the judgments in previous cases which apparently go further; but in those cases the Court was only dealing with simple contract debts. Lord Selborne gave the true explanation of the doctrine.

Mark Romer, for the judgment creditors. The bank are not entitled to priority over us. If they are to be treated as unsecured creditors of the company, the question may then arise whether they are entitled to rank pari passu with the judgment creditors, or whether they are subject to their claim. We object to the bank having any higher right than they would have had if the borrowing had been legitimate.

R. J. Parker, for the company.

Neville, Q.C., in reply. The equity cannot depend upon whether the borrowing company is in liquidation or not; the principle would apply equally to either case. In *Baroness Wenlock* v. *River Dee Co.* (1) the company was a going

(1) 19 Q. B. D. 155.
(2) Ibid. 165.
(3) 4 D. M. & G. 19.
(4) L. R. 4 Ch. 748.

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concern. The action was brought by the lender against the company, and it was held that the lender was subrogated to the rights of the creditor who had been paid by means of his money. Subrogation is the true basis of the doctrine, not adoption by the company. A company cannot adopt that which is illegal. Fry L.J., in *Baroness Wenlock* v. *River Dee Co.* (1), did indeed put it upon an imaginary assignment of the creditor's rights. That is really subrogation. If this be so, the right of the bank is clear.

[LINDLEY M.R. If no injustice would result. But suppose a holder of C debenture stock had bought his stock upon the faith that the interest upon the A stock had been paid?]

There is no proof that any one did so. If the money advanced by the bank is treated as if it had not been advanced, that is, repaid to the bank, every one will stand in the same position as before.

Cur. adv. vult.

Feb. 16. LINDLEY M.R. Agreeing as I do with Romer J., and with the judgments which my brothers have prepared, and which I have read, I should say nothing more, if it were not that I think I ought to express my dissent from the observations of Fry L.J., on which the appellants base their contention. The decision of the Court in *Baroness Wenlock* v. *River Dee Co.* (1) was quite right, and the judgment in it is very valuable. Fry L.J., who delivered it, was the last person to shut his eyes and not get at the real facts and substance of any case before him. But in dealing with that case he says (2) that "the Court closes its eyes to the true facts of the case." I cannot help thinking that this is incorrect. A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of Equity have always looked into the facts to see whether the prohibition has been really disobeyed or not. If it is disobeyed, and to the extent to which it is disobeyed, the prohibition is enforced. But, if the facts

(1) 19 Q. B. D. 155. (2) 19 Q. B. D. 165.

when ascertained shew that in truth it has not been disobeyed, an advance of money is treated as not prohibited, although it may at first sight appear to be so because it is beyond the limited amount. The application of the money borrowed shews whether the obligations of the borrowing company have been increased or not, and the extent, if any, to which they have been increased. So far as the money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the Courts have so decided. The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at; but that theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and as applied to the cases before the Courts it led to just results. But, if logically followed out in other cases, it leads to consequences not only not foreseen by those who had recourse to it, but to results so startling that I cannot accept the theory as sound. There is no decision yet in which it has been applied so as to defeat any innocent person, nor so as to place the lender in a better position than that in which he would have been if his loan had not been prohibited. But that would be the result in the present case, if we adopted that theory and pushed it to its logical consequences, as the appellants contended we ought to do. The Legislature (30 & 31 Vict. c. 127, s. 26) has recognised and partially acted upon the true principle in enacting that money borrowed by a company for the purpose of paying off, and duly applied in paying off, existing statutory mortgages or bonds of the company shall, so far as the same is so applied, be deemed money borrowed within, and not in excess of, the company's statutory powers. This principle obviously cannot in reason be confined to statutory bonds or mortgages; and Courts of Equity have acted upon the principle, and have not confined its application within arbitrary limits, but have enforced it more widely than the Legislature, in order to prevent great injustice. They have done so, however, not by closing their eyes to the real facts and acting on a fiction, but by diligently ascertaining the real truth, and by attending to the real

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substance of each case. Even if the fiction of subrogation were correct, the maxim "In fictione juris semper existit æquitas" would prevent its application to the present case.

RIGBY L.J. The only questions arising on the present appeal are as to the right of the North and South Wales Bank to rank in priority to the claim for interest of the debenture stockholders of the railway company, or some of them, in respect of payments of past interest on debenture stock already paid by the bank, at a time when the railway company had exhausted its borrowing powers. There are three classes of debenture stock, A, B, and C, all charged on the undertaking of the company, but ranking thus in order of priority—first A, second B, and third C. Under a judgment creditor's petition, presented in pursuance of the Railway Companies Act of 1867, a receiver has been appointed; and by the Act it is provided (s. 4) that all moneys received by him, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, are to be applied and distributed, under the direction of the Court, in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein. Subject to the claim of the bank, the debenture stockholders are without question entitled, according to their priorities inter se, to be paid, in preference to all other claimants, the interest now due to them, and there is sufficient in the receiver's hands to satisfy the whole of the interest payable on stock of class A, and part, but only part, of that payable on stock of class B. The bank claim, first, to have priority, in respect of all their advances which have been applied in payment of interest on debenture stock, over all interest payable in respect of debenture stock; or, secondly, priority, in respect of all advances applied in payment of interest on stock of class A, over interest payable in respect of classes B and C; and similarly, as between classes B and C, priority over interest on class C for advances applied in payment of interest on class B. The claim in each case is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of, the creditors

who have been paid off, and this is the only claim with which I propose to deal. I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed, or can be justified in principle. I will first deal with the authorities which have been cited to us. I put aside the *German Mining Company's Case* (1), as being a decision only on the ordinary partnership rights of directors and shareholders in an unlimited company in the special circumstances arising in that case, and found as facts by Knight Bruce L.J. With regard to all the following cases, it is no doubt the fact that expressions pointing to some sort of subrogation were used by the learned judges in delivering judgment; but it is necessary to examine closely what was actually decided in the different cases.

The first case is *In re Cork and Youghal Ry. Co.* (2) There a claim was made by holders by deposit of Lloyd's bonds for payment out of a surplus of sale moneys arising from a sale of the company's undertaking under statutory authority. This surplus was under the statute to be applied thus (3): "The surplus shall be subject to all the rights, equities, priorities, claims, and demands, whether of preference or ordinary shareholders, bondholders, or others, to which the property would, in case this Act had not been passed, have been subject, and shall be applied accordingly."

No question was dealt with, or indeed arose, except as between the claimants and the shareholders. The order actually made ran as follows (4): "Declare that the receipt and expenditure by the directors of the company, in payment of any sums recoverable from the company of moneys advanced on or procured by means of the deposit of the alleged bonds" (i.e., the Lloyd's bonds), "was pro tanto an adoption by the company of the transactions; and, having regard to the representations contained in the alleged bonds, the moneys so expended constituted debts owing from the company." Then followed an inquiry which (shortened only for clearness) ran as

(1) 4 D. M. & G. 19.
(2) L. R. 4 Ch. 748.
(3) L. R. 4 Ch. 752.
(4) Ibid. 761.

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follows: Whether the company had had the benefit of any expenditure, in payment of any sums recoverable from the company, of any moneys advanced on or procured by means of the deposits of the alleged bonds, and whether any of the sums so expended still remained unpaid by the company. In this order there is nothing of the nature of subrogation to the rights of creditors, and of course no subrogation either to their securities or priorities, if they had any. The primâ facie illegal Lloyd's bonds were held to be evidence of debts to the extent only to which the transaction amounted to a borrowing with one hand and an expenditure in reduction of the liabilities of the company with the other, the company being pro tanto treated as not borrowing in excess of their powers, and therefore capable of adopting the transactions. This is in substance the explanation of the case given in the judgment of the Court of Appeal (delivered by Lord Selborne) in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), to which reference will be made presently. That action was brought for (amongst other matters) the recovery by the official liquidator of certain assets of the company, namely, deeds deposited with Cunliffe, Brooks & Co., their bankers. The defence to this part of the action (with which alone the Court of Appeal was concerned) was, that the defendants had a lien for moneys owing on the society's banking account. The Vice-Chancellor of the County Palatine, from whom the appeal was brought, had disaffirmed the lien, on the ground that the overdrafts on the banking account constituted an illegal borrowing by the society, which had no power to borrow. The Court of Appeal reversed this order, and remitted the case to the Palatine Court, with directions and declarations of which the following is the most material: "Declare, that at the date of the petition to wind up the society the appellants were entitled to hold the title-deeds and documents in the pleadings mentioned as a security for repayment of so much, and so much only, of the moneys advanced by them from time to time to the society as were applied in payment of the debts or liabilities of the society properly payable, and had not been subsequently repaid to the

(1) 22 Ch. D. 61, 71.

appellants, if at the time aforesaid anything which had been so applied still remained due."

This was in substance following *In re Cork and Youghal Ry. Co.* (1) It gave effect to a part of the security given to the bank, but not by way of subrogation to the rights of the creditors paid off, their securities or priorities. The grounds on which the decision was based were thus explained by the Lord Chancellor (2): "I think the consistency of the equity allowed in the *Cork and Youghal Ry. Co.'s Case* (1) with the general rule of law, that persons who have no borrowing powers cannot by borrowing, contract debts to the lenders, may be shewn in this way. The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing."

There was an appeal by the bankers from this decision to the House of Lords, but there was no cross-appeal; so that the equities of the doctrine acted upon did not come into question. (3) Lord Blackburn did indeed say (4): "The Court of Appeal, in the present case, held that though there was nothing that amounted to an assignment to the bankers of the claims of those who were paid off by the money advanced, yet, if it could be shewn that such claims were in fact paid off

(1) L. R. 4 Ch. 748.
(2) 22 Ch. D. 71.
(3) See 9 App. Cas. 857.
(4) 9 App. Cas. 866.

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thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an assignment." But he went on to say: "It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House." He thus guards himself against expressing any opinion on the question now being discussed.

A second action, *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), was brought for a general account of all moneys received by the bank, and the application thereof, as distinguished from the action for redemption with which I have already dealt, and in that second action the question as to the allowance to be made to the bank took a wider form. One equity which was there allowed to the bankers was, to follow their money where they could shew it to have been invested, and to get the benefit of any securities which the society would not have had but for the investment of the money so followed. With this equity we have nothing to do now. The other equity was, that they were allowed the benefit of money which had been applied in the payment of withdrawing members, who had been paid off by means of the bankers' money, and who would not have been paid but for that money. This was not an extension, but a mere application, of the rule laid down in the first case, when once it was admitted (as it was) that these payments were of liabilities which the society were bound to satisfy before paying anything to the continuing members. The withdrawing members had no priority as between themselves and other creditors, and had no securities, but they came in after all outside creditors, as being themselves creditors or quasi-creditors: see *Walton* v. *Edge*. (2) There could, therefore, be no subrogation in their case to any securities or priorities, and it became a matter of indifference whether the bankers were said to stand in the place of the creditors, or whether (as I think is the better way of stating it) the discharge of the liabilities of the company to those creditors validated the overdraft of the company on the banking account, to the extent of the moneys so applied.

The remaining case, and, so far as I know, the only one

(1) 29 Ch. D. 902. (2) (1884) 10 App. Cas. 33.

material to be considered, is *Baroness Wenlock* v. *River Dee Co.* (1), in its various stages. It was not reported in the LAW REPORTS on the first hearing in the Court of Appeal, but the judgments are given in 36 Ch. D. 675, n. The company was a going company. The action was brought by the executors of Lord Wenlock to recover on covenants a large amount lent by him to the company. Huddleston B. at the trial had given judgment for the plaintiff for a sum not less than 85,000*l.* The Court of Appeal held that the company had no borrowing power beyond 25,000*l.*, but decided that the plaintiffs had a right to recover 25,000*l.*, and also to the extent to which they could shew that the moneys advanced had been expended in paying off debts and liabilities recoverable against the company, thus following the first *Blackburn Building Society's Case.* (2) No doubt, in the judgments of Lord Esher M.R. and Cotton L.J. there are some expressions which seem to found the equity they were administering upon a right to stand in the place, and as assignees, of the creditors who had been paid off. But I do not think that those learned judges intended to differ from the grounds laid down in the first *Blackburn Building Society's Case.* (2) Bowen L.J. in so many words referred to, and professed simply to follow that case.

No question of securities or priorities of creditors paid off arose there, and in such circumstances it makes practically no difference whether the equity is described as a right of subrogation to creditors, or as it was described by Lord Selborne. (3)

The case went on appeal to the House of Lords, but the only question there dealt with was, the company's power to borrow, as to which the decision of the Court of Appeal was affirmed. Before the referee, to whom the inquiries directed by the Court of Appeal were referred, the question arose, whether the creditors paid off must have been creditors at the time when the advances were made, or whether the payment of creditors whose debts became due after the advances were made might not also fall within the scope of the inquiry. Again, no question arose as to securities held by, or priorities

(1) 19 Q. B. D. 155. (2) 22 Ch. D. 61.
(3) 22 Ch. D. 71.

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of, the creditors paid off. The Court of Appeal, both on the form of the inquiry already directed and on principle, held that creditors fell within the scope of the inquiry, whether their debts became due at or after the time of the advances out of which they were paid. The judgment of the Court was delivered by Fry L.J., and it is upon a passage in his judgment that the appellants place their chief reliance. That passage is as follows (1): "This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys: and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit." Now, the first observation on this part of the judgment is, that it has nothing to do with any securities held by the creditor, nor, as I think, with his priority over other creditors. If it did refer to securities or priorities of the creditors it would be an obiter dictum only. If the equity extended to securities it would probably, in most cases, be impossible to give effect to it, as the creditor who was paid off, not knowing whence the money to pay him off came, would give up his securities to the company, and the company would deal with them in the ordinary course of business long before the quasi-lender could assert his rights. If the equity extended to priorities it would in many cases work injustice. It cannot be suggested that the quasi-lender acquires any equity as against the creditor who is paid off, for he does not know whence the money comes; still less, if it were possible, can he have an equity as against creditors who have no part in the transaction to be ranked before them. I do not think that it would be fair to suppose that the Court of Appeal intended to lay down any new law, or to make a statement in any way at variance with the authority which they were following. The statement, as it seems to me, ought

(1) 19 Q. B. D. 165.

to be confined to the equity, so far (if at all) as it depends upon subrogation. Indeed, the judgment goes on to quote with approval the very passage from Lord Selborne's judgment (1) which I have already quoted, and to apply it in exactly the same way as Lord Selborne had done. If the equity, so far as it depends upon subrogation, is founded upon a fiction and involves a closing of the eyes of the Court to the true facts, so far as it is expounded by Lord Selborne it depends upon the real facts, and requires a complete examination of them.

I think that the great preponderance of authority shews that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases, and that there is, at any rate, no authority for any subrogation to the securities or priorities of the creditors paid off. Dealing with this case independently of the authorities, I see no reason why the parties to an illegal lending should have anything more than bare justice dealt out to them; and this they get if they are allowed, as they have hitherto been allowed, to have that portion of the advance actually expended in payment of debts of the company treated as a valid advance. If the advance had been within the borrowing powers of the company, the bank could have had no right to the securities or priorities of the creditors paid off. It seems to me that it would be unjust to other creditors that a fiction should be invented for the purpose of making an invalid loan more valuable than a valid one. I entirely agree with what Romer J. said about the unsatisfactory way in which such a doctrine as is contended for by the appellants would work in practice, and I do not consider it necessary to repeat it.

VAUGHAN WILLIAMS L.J. (after stating the facts). Generally speaking, if a company, which has exhausted its borrowing powers, purports to borrow further money, and thus obtains a supply of money, the loan so contracted is void and ultra vires, and the lender has no right of action against the company; but, nevertheless, in some cases, the person supplying the money is able to obtain recoupment from the funds of the

(1) 22 Ch. D. 71.

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company, and the question to be determined in such a case may be stated generally to be, what is the principle upon which the person supplying the money is entitled to recoupment as against the company, and what is his relation in regard to priority to the various classes of creditors of the company? Now, there seem to me to be two principles upon which the right of recoupment may be enforced by the person supplying the money against the company which has exceeded its borrowing powers. The one principle is, that, although the borrowing power is exhausted, and the transaction which purported to be a loan to the company is as such ultra vires, and therefore null and void, so that the would-be lender can neither enforce repayment of the loan nor rely upon the securities which he has taken for the loan, yet, if the company apply the money in their hands to the payment of debts actually owing by them, there is thereupon a new transaction between the company and the person who has paid the money for the purpose of the ultra vires loan.

If the ultra vires loan is to be treated as an illegal prohibited transaction, as distinguished from a contract into which the company have no capacity to enter, there is no action at law or in equity by which the lender can recover back moneys which he has paid over in pursuance of the illegal contract. If, on the other hand, the ultra vires loan is to be treated merely as something ultra vires, and not as an illegal transaction, there is no reason why the lender should not recover the money thus paid from the company, as money received to the use of the lender, by reason of the failure of consideration arising out of the incapacity of the company to borrow, provided always that the dealing by the company with the money has not been such as to shew that, notwithstanding the form of action adopted, the money has really been so dealt with by the company as that, in the interval between the lending of the money and the bringing of the action, the company has increased its borrowing obligations beyond its borrowing powers. In order to make more clear this statement of what I conceive to be the position of the company in a case in which the loan can probably be treated as an ultra vires, as distinguished from

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an illegal loan, I will put a hypothetical concrete case. Suppose a company purport to borrow a sum of money in excess of their borrowing powers, and, before they have in any way made use of the money, an action is brought to recover it, as on failure of the consideration for which it was paid, the money would be recoverable. Or, again, supposing the company have applied the money in the payment of pre-existing debts, the money would be recoverable, because in each of these cases there has been no real excess of the powers of the company, and the form of action is not made a cloak to cover a transaction which is really ultra vires. It is like the case of money in the hands of a stakeholder, before it has been dealt with in accordance with the result of the wager. But, if the company, instead of either refraining from adopting the loan, or applying it in such a manner as that their total indebtedness shall remain unchanged, apply it, say, to the purchase of new property, the company cannot, after so doing, be sued in any form for a return of the money, since the money has been dealt with under the contract of loan, and to allow the company to repay it would simply be to allow them to carry through an ultra vires transaction. I do not know that the distinction between an illegal and an ultra vires contract really makes much difference in the present case, for, in my judgment on the facts, there never was a moment of time during which the loan was illegal or ultra vires, because the loan took the form of a request by the company to the bank to pay the interest, i.e., the debt, to the holders of the debenture stock warrants, and a payment by the bank direct to the holders. But, in considering the decisions which base the right of the lender to recoupment upon some new contract between the company and the lender for the application of money paid as and for a performance of the ultra vires contract, it is desirable to consider how far the money so paid continues in the hands of the company to be the money of the lender, and how far the Court is justified in implying a new bargain for the application of the money, which has thus been dealt with by the order of the company, and, if the Court is justified in so doing, whether this involves the assumption of an assignment to the bank by the debenture stockholders of

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those rights in respect of which they have received payment from the bank.

The other principle upon which the right of recoupment has been allowed to be enforced against a company, in a case in which the borrowed money has been applied in payment of debts of the company, is to subrogate the lender to the rights of the creditor who has been paid off, and to treat the lender of the money as the assignee of the debt which has been paid off.

I propose now to go through the authorities, and to see what are the principles in each case upon which the rights of the lender to recoupment have been enforced against the company. The first case, *In re German Mining Co.* (1), seems really to decide only that an ordinary company is liable to pay the debts contracted by the manager. In the second case, *In re Cork and Youghal Ry. Co.* (2), the Cork and Youghal Railway Company, after it had exhausted its borrowing powers, issued to one Lewis Lloyd's bonds, to enable him to raise money for the purposes of the company. Lord Hatherley, after pointing out (3) that the judgments of Crompton and Blackburn JJ. in *Chambers* v. *Manchester and Milford Ry. Co.* (4) made it clear that, "where a company is authorized only to raise a given amount of capital by shares, and a certain other sum by debentures or mortgages, then the company cannot issue any debenture or loan-note, or any security of that description, for the mere purpose of raising money, and that any such instrument so issued would be just as void in equity as at law, being contrary altogether to and absolutely forbidden by statute," and that accordingly the Lloyd's bonds in that case, not being issued in respect of debts actually due, but simply issued for the purpose of raising money, were null and void, and instruments to which no legal validity could be attributed, went on to say (3): "In that case a distinction is drawn by Blackburn J. which appears to me to be very plain and clear. He" (Blackburn J.) "says that these instruments 'are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instrument may be useful in

(1) 4 D. M. & G. 19.
(2) L. R. 4 Ch. 748.
(3) L. R. 4 Ch. 757–9.
(4) (1864) 5 B. & S. 588.

this way—when a company are indebted it may be convenient to make a bond pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the onus of shewing the non-existence of the debt; but, if there be no debt existing, such an instrument cannot create one, nor put the assignee in a better position than the original obligee or covenantee, and the person holding it could not recover upon it, if it were shewn that it were given gratuitously, or was not authorized by statute.' That being the state of the law, we have to consider the circumstances of this particular case. It is shewn, I think, that, as regards some of the moneys which have been raised through the medium of Mr. Lewis, some small portions were paid directly to persons who were actual creditors of the company, and so far, I apprehend, there could be little or no dispute as to the right of Mr. Lewis, or of a person claiming through him, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid." And later on (1) Lord Hatherley said: "The proper course to be taken seems to me to be this: that, so far as the company have adopted the proceedings of their directors, by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that the bondholders stand as assignees of the debts, which, no doubt, have not actually been assigned, but it has been represented by the directors that the persons who lent their money on these acknowledgments were lending their money for the purpose of clearing off the debts; in fact, that they were to be put in the position of assignees of the debts." The inference which I draw from this judgment is, that Lord Hatherley thought that the borrowing of money by the company for the purpose of paying off debts of the company was not, in a case in which the money was so applied, an ultra vires borrowing at all, and

(1) L. R. 4 Ch. 761.

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I do not quite understand why Mr. Lewis who lent the money should not have sued the company at law for the money so lent, in so far as the money was lent for the payment of the legitimate debts of the company and was so applied. In the actual case before the Court it was not Mr. Lewis who was seeking to recover the money advanced, but the persons from whom Mr. Lewis had raised the money which was thus applied, and it may be that it was the absence of privity between these persons and the company which made Lord Hatherley think it necessary to say, that these persons were entitled to obtain repayment from the company of the moneys so advanced, by virtue of their standing in the shoes of the creditors whose debts were paid off. But undoubtedly he did base their right on this consideration, and Giffard L.J. in his judgment said (1): "That being so, what the case amounts to is this: Documents were given under the seal of the company. Those documents represented that the company was indebted to Mr. David Leopold Lewis in the amount there stated; they were given for the purpose of being deposited by him as security for advances to be made; and, if the representations in them had been true, those who advanced their money on the deposit would have been assignees of the debts actually owing from the company to Lewis, and the transaction would have been perfectly legal." I observe that Giffard L.J. speaks of the bondholders as the assignees of Mr. Lewis, and not as the assignees of the creditors of the company whose debts had been paid off, and it seems to me that this is a more correct way of stating the position. But in the present case the bank are in the position of Mr. Lewis, and I cannot understand why there is any need to invent any fiction whatever to give the bank the right of action, or any necessity to vest in the bank the rights of the creditors who have been paid off; but, if there is any such necessity, these judgments seem to be authority for the proposition.

The next case to be considered is *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (2) In that case the building society had overdrawn their account to a large amount, and by a

(1) L. R. 4 Ch. 762. (2) 22 Ch. D. 61.

memorandum of agreement they had purported to give their bankers, in respect of the balance from time to time due to them, security upon certain deeds deposited with them. That overdrawing of the bankers' account was ultra vires, and it was held that the bankers had no lien under the agreement on the deeds deposited, but that they were entitled to hold the deeds as a security for such part of the money advanced by them as had been applied in payment of the debts and liabilities of the society properly payable. Lord Selborne, after pointing out that the transaction was ultra vires and that the bankers had under the agreement no lien on the deeds, said (1): "But there is an equitable principle, consistent with the law of which I have spoken, sound in itself, and also sufficiently established by authority, which may entitle them, nevertheless, to some benefit from their securities; and, if the facts of the case give them the benefit of that equitable principle, it is consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing shall not stand in the way of the justice due to them. That was established, to mention one authority only, in the case of *In re Cork and Youghal Ry. Co.* (2) before this Court of Appeal; where it was held, in respect to that class of securities which were called Lloyd's bonds, that although they could in themselves constitute no indebtedness as against the company issuing them, yet, nevertheless, they might be so far evidence of a contract between the company and the persons holding them, sufficient to entitle the holders to that security or right of repayment, which the company might lawfully have given them under the actual circumstances of the case, if that form had not been adopted." [His Lordship read the passage from the judgment of Lord Selborne, which was quoted above by Rigby L.J., and continued:—]

Now, it does not seem to me that the equity relied on by Lord Selborne involves in any way an assumption that the debts of the creditors of the company who have been paid off are to be treated as assigned to the lender who provided the money. For, although he states it to be the equity established

(1) 22 Ch. D. 70. (2) L. R. 4 Ch. 748.

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by *In re Cork and Youghal Ry. Co.* (1), this does not involve the assumption of an assignment, for he seems to treat that part of the judgment of Lord Hatherley and Giffard L.J. as not being essential to their decision.

It is right, however, to point out that Lord Blackburn in the House of Lords, in dealing with an appeal which did not go to the main question itself, seemed to regard the position of those who pay off the creditors as that of standing in the shoes of the creditors so paid off.

The next case is *Baroness Wenlock* v. *River Dee Co.* (2) There can be no doubt that in that case the Court of Appeal did treat the right of the lender of money, borrowed by the company ultra vires, to recoupment as based upon subrogation to the rights of the creditor paid out of that money, and also held that the right to recover from the company the amount of their debts or liabilities so paid off is not confined to the amount of debts and liabilities existing at the time of the advance, but extends to debts and liabilities accruing subsequently to and paid out of the same advance. Fry L.J. (3) thus states the equity upon which the right of the lenders is based. [His Lordship read the passage from the judgment of Fry L.J., quoted above by Rigby L.J., and continued to quote from that judgment:—] "There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company: in the coffers of the company the money really advanced as a loan is still thought of by the Court as the money of the quasi-lender: and the Court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the Court. The true limit of the doctrine we conceive to be stated by Lord Selborne L.C. in delivering the judgment of this Court in the case of the *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (4) 'The test,' said he, 'is, has the transaction really

(1) L. R. 4 Ch. 748.
(2) 19 Q. B. D. 155.
(3) 19 Q. B. D. 165.
(4) 22 Ch. D. 61, 71.

added to the liabilities of the company?'" Fry L.J. went on to quote the remainder of the passage in Lord Selborne's judgment which I have already quoted. It is to be observed that Fry L.J. does not purport to be going beyond the judgment in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1) It seems to me that there is no trace in that judgment of the benevolent equity spoken of by Fry L.J. There is some trace perhaps of the assumption of an assignment, but it does not seem to me that either in this case or in *In re Cork and Youghal Ry. Co.* (2) the assumption of an assignment of the debts of the creditors paid off is in any way essential to the equity on which the judgment is based. No case is to be found in which the lenders have ever in fact succeeded in enforcing the securities of the creditors who have been paid off.

I have dealt with the authorities thus at length in order to arrive at the principles upon which the Courts have proceeded in cases of this character; but I do not think that all the difficulties with which the Courts had to deal in those cases arise in the present case, for in the present case the bank simply lent money for the payment of a half-year's interest due to the debenture stockholders, and paid the money direct to those stockholders. I do not believe that this transaction was ultra vires at all; and, if so, I cannot understand why an action for money paid should not successfully be brought by the bank. The money never was in the hands of the railway company. There was no interval of time after the money was advanced during which it was uncertain how it would be applied, and, this being so, I can see no need for the invention of any fiction. I very much doubt whether, either at law or in equity, a man who pays off a debt at the request of another is necessarily to be treated as the assignee of that debt; but a very little evidence will be sufficient to establish that, as between himself and the person at whose request he has paid off the debt, it was intended that he should be treated as the transferee of the securities, if such there be, in the hands of the creditor. But in the present case there are no such securities. The discharged

(1) 22 Ch. D. 61, 71. (2) L. R. 4 Ch. 748.

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interest certificate is not such a security, and I do not see what right the company and the person who supplies the money to pay off the creditor have to say that the debt which has been paid off shall be treated as if it had not been paid off. There has been no assignment in fact by the creditor, and I do not see that the justice of the case in any way requires that the Court should assume, contrary to the fact, that there has been such an assignment.

This judgment assumes that, in the circumstances of this case, there has been no borrowing in excess of the powers of the company, and that no occasion arises for the application of any equitable principle to do justice between the bank and the company. But if my conclusion as to this is wrong, and the directors did assume to do an act ultra vires of the company in procuring the bank to pay these interest warrants, equity will treat the illegal or ultra vires transaction entered into by the directors, under which the company has received the money, as being an intra vires transaction to the extent to which the borrowing, of which the company have had the benefit, would have been effectual as an intra vires transaction at the moment of the making of the payment of which the company have had the benefit, and this whether the original contract purported to be made was merely ultra vires or illegal. The principle is not unlike that adopted at law where money paid for the purpose of an illegal transaction is held to be recoverable, so long as the contract is executory or in fieri. This equity, as defined in the earlier cases cited, seems to involve no assumption of assignment or subrogation, as Fry L.J. seems to have thought in *Baroness Wenlock* v. *River Dee Co.* (1) I should shrink myself from saying that the state of things assumed in equity for the purpose of doing justice between the parties must not be carried to its logical results. If equity requires you to assume a contract where none has been executed, it seems to me that equity, as well as law, must govern the relations between the parties to the assumed contract on the basis that there was a contract in fact. Nor do I see that pushing the equity to its logical

(1) 19 Q. B. D. 155.

conclusion would do any injustice to innocent persons. It can make no difference to the other creditors whether the creditor who has priority is the warrant-holder or the bank.

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Solicitors: *Rowcliffes, Rawle & Co.; Field, Roscoe & Co.; Sharpe, Parker & Co.; Norris, Allens & Chapman; Cunliffes & Davenport.*

W. L. C.

In re HARRISON AND BOTTOMLEY.

C. A. 1898 NORTH J. *June* 11; *July* 2. C. A. 1899 *Jan.* 28.

[1898 H. 067.]

Judgment Debt — Charge on Land — Legal Remainder — Receiver — Equitable Execution — "Actual Delivery in Execution" — Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 13 — *Judgments Act*, 1864 (27 & 28 *Vict. c.* 112), *ss.* 1, 4 — *Practice — Sale — Summons — Petition — Rules of the Supreme Court, Order* LV., *r.* 9 B.

A judgment debt is not enforceable as a charge against the judgment debtor's legal remainder in real estate: nor does an order obtained by the judgment creditor appointing a receiver constitute an "actual delivery in execution" within s. 1 of the Judgments Act, 1864, entitling the creditor to a sale of the remainder under s. 4.

Decision of North J. affirmed.

Per North J.: An application by a judgment creditor for a sale under s. 4 of the Judgments Act, 1864, for the recovery of his debt, is now more properly made by summons and not by petition: Rules of the Supreme Court, Order LV., r. 9 B.

On July 13, 1896, in an action in the Probate Division of *Woods* v. *Harrison*, the plaintiff, Woods, obtained judgment against the defendants, Sarah Harrison, a widow, and Barbara Bottomley, a married woman, and under that judgment a sum of 122*l.* became due to the plaintiff for his taxed costs.

By his will dated July 1, 1895, one Henry Gresham devised and bequeathed his residuary real and personal estate to his wife Grace Gresham for life, with remainder to the said Sarah Harrison and Barbara Bottomley in equal shares. The testator died on July 2, 1895, and on August 24, 1896, his will was proved by his executor, the plaintiff, Woods. The testator's widow, Grace Gresham, survived him and was still living. At

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the time of his death he was seised in fee simple in possession of five freehold houses in Gainsborough. On April 12, 1897, the plaintiff, Woods, obtained an order from the Probate Division appointing a receiver of "the rents, profits and monies receivable in respect of" the houses, and this order was duly registered at the office of Land Registry under s. 5 of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51).

The 122*l.* being unpaid, the plaintiff presented a petition in the Chancery Division, intituled in the matter of the Judgments Acts, 1838 and 1864 (1 & 2 Vict. c. 110; 27 & 28 Vict. c. 112), and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and in the matter of the two residuary legatees, stating the above facts, and asking that their interests, "which have been delivered in equitable execution as aforesaid, may be sold, and that the money arising from such sale may be applied in payment to your petitioner of what is due to him under the said judgment of the 13th of July, 1896," and for all necessary accounts and inquiries.

An affidavit in support of the petition stated that of the two residuary legatees Mrs. Harrison was in extremely poor circumstances, and Mrs. Bottomley had no separate property that could be reached by any process of legal execution, her husband being a gardener in receipt of about 1*l.* a week wages.

The five houses in question were about 640*l.* in value, and were of the net annual value of about 42*l.*

The petition came on for hearing before North J. on June 11, 1898.

The main question was whether, inasmuch as the testator's widow, Grace Gresham, was still living, so that the interests of Mrs. Harrison and Mrs. Bottomley were legal estates in remainder, Woods, the judgment creditor, was entitled to have them sold in order to satisfy his debts.

W. H. Stevenson, for the petition.

F. J. Lampard, for the reversioner, referred to s. 13 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), and to ss. 1 and 4 of the Judgments Act, 1864 (27 & 28 Vict. c. 112).

[NORTH J. referred to *Pratt* v. *Bull.* (1)]

According to the Rules of the Supreme Court, Order LV., r. 9 B, the application should have been made by summons, not by petition.

Cur. adv. vult.

1898. July 2. NORTH J., after stating the facts and saying that the application ought to have been by summons:—The jurisdiction to make an order on petition is not absolutely taken away, and I should not have dismissed the petition on that ground, but should have made the petitioner pay the extra costs occasioned by the application having been made in that way instead of by summons. But there are other objections. I referred counsel in the course of the argument to a case the name of which I could not at the moment call to mind. It is the case of *Pratt* v. *Bull* (1), in which it was held that an order by the Probate Court, such as has been made in this case, is not an order which creates a charge on land. I pass over the question whether that is still law without deciding it, because there are other difficulties behind which prevent me from making an order in favour of the petitioner.

It appears that the tenant for life, Grace Gresham, is still alive. If she had not been alive, it is quite clear that the land could have been actually delivered in execution, but has not been so delivered; and that would have been an answer to the petition. When it turns out that she is alive, there is another insuperable difficulty. I observe that the order on which the petition is founded is that the receiver should receive the rents, profits, and moneys receivable in respect of this property. I cannot understand this: it is an appointment of a receiver of the rents and profits belonging, not to the judgment debtors, but to somebody else; as the land is land to which they are entitled only in remainder. However, there the order is. There was a case of *In re South* (2), in which a plaintiff, who had recovered judgment with damages in an action in tort against an infant, sued out an elegit against the infant's land on the judgment. The infant's only interest in the land was a remainder in fee

(1) (1863) 1 D. J. & S. 141. (2) (1874) L. R. 9 Ch. 369.

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expectant on the death of a tenant for life, which produced no present income to the infant. The sheriff returned that the infant was seised of the reversion of the land in fee simple, and that it was of the annual value of 124*l.*, and that he had delivered the premises to the creditor. The creditor then presented a petition under the 27 & 28 Vict. c. 112, s. 4, for a sale of the infant's interest in the land; and it was held, first, that the sheriff had no power to seize an estate in remainder belonging to an infant, and therefore the judgment creditor had acquired no charge on the infant's interest; secondly, that the sheriff having erroneously returned that the infant was seised of a reversion producing a present income, a petition for sale of the infant's interest, which was a bare remainder, was inconsistent with the return and could not be supported.

So here, the order I am asked to make for the sale of a reversion is entirely inconsistent with the order that has been made in the Court of Probate appointing a receiver of the rents, to which I cannot pay any attention.

Again, in *In re Hamilton* (1) this state of things arose. Two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bankruptcy. There being no income applicable to the maintenance of the infants, an application was made on their behalf that a yearly sum might be allowed for that purpose, and borrowed on the security of a mortgage or charge on the real estate to which they were entitled as above, the amount for which the charge was to be given including the premiums on the insurance requisite for the protection of the lender, and it was held that an order sanctioning the scheme could not be made, and that the principle of *In re Howarth* (2) would not support it; for that, although judgment might be recovered against the infants for necessaries supplied to them a judgment would not charge the estates of the infants, inasmuch as those estates were so circumstanced that they could not be delivered in execution."

Lindley L.J., after saying that one objection appeared fatal in the course of his judgment, proceeds: "Then again, by

(1) (1885) 31 Ch. D. 291, 294. (2) (1873) L. R. 8 Ch. 415.

27 & 28 Vict. c. 112, s. 1, no judgment is to affect any land until such land has been actually delivered in execution. When it has been so delivered, but not before, the Court under s. 4 can direct a sale of the debtor's interest in the land. Now, in the present case, the land cannot be delivered in execution by the sheriff, the estate of the infants being only an estate in remainder, and a Court of Equity could not during the continuance of the life estate deliver it in execution by the appointment of a receiver. We should therefore have to invent some new form of execution before we could make an order binding the estates." I will only refer further to the case of *Hood Barrs* v. *Cathcart* (1), in which I decided that a judgment debt is not enforceable as a charge on a reversion in real estate. Under these circumstances the petition is misconceived, and I dismiss it with costs; to be set off against the costs due to the petitioner under the judgment of the Probate Division.

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The petitioner appealed. The appeal was heard on January 28, 1899.

C. A.

W. H. Stevenson, for the appellant, the petitioner. The question is whether a judgment debt, which by s. 13 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), is clearly made a charge on "all lands" of or to which the judgment debtor is "seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy," can be enforced against a legal estate in remainder by a sale under s. 4 of the Judgments Act, 1864 (27 & 28 Vict. c. 112). It is true that in *Pratt* v. *Bull* (2), where the question arose whether the Probate Court was a Court of Equity, it was held that an order of the Probate Court for payment of money was not a charge on land within s. 13 of the Act of 1838; but that was a case before the Judicature Act. North J. seems to have considered that the charge could have been enforced had it not been for s. 1 of the Judgments Act, 1864, which enacts that no "judgment, statute, or recognizance"

(1) [1895] 2 Ch. 411. (2) 1 D. J. & S. 141.

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shall affect any land "until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance." The learned judge appears to have decided the case upon the authority of *Hood Barrs* v. *Cathcart* (1); but that case is not an authority directly in point, for that was an action brought under the Act of 1838, and, moreover, there no receiver was appointed. The appointment of a receiver is equitable execution within s. 1 of the Act of 1864, and constitutes a delivery of land, even though the property affected by the order is a remainder or reversion, for the mere intervention of a legal impediment does not affect the ownership: *In re Jones* (2); *Re Cooper* (3); *In re South* (4), where James L.J. appears to have drawn a distinction between a reversion in fee simple and a remainder, holding that the former was an interest which could be taken by the sheriff: *In re Pope* (5); *Fuggle* v. *Bland* (6), followed in *Tyrrell* v. *Painton* (7); *Ex parte Evans.* (8)

[RIGBY L.J. But a remainder cannot be got in.]

In *Hatton* v. *Haywood* (9) Lord Selborne says (10) there is nothing to justify a narrow construction of s. 1 so as to confine it to land capable of delivery at law by the sheriff.

[LINDLEY M.R. That does not touch reversionary interests in land. What do you say to *In re Hamilton* (11), where it was held that a Court of Equity could not, during the continuance of the life estate, deliver an estate in remainder in execution by the appointment of a receiver?]

That is a mere dictum or suggestion that this could not be done. If the order appointing the receiver does not affect the land, it is a nullity and the judgment debtor may sell the land in spite of it. Physical delivery is not necessary. The foundation of the jurisdiction of the Court of Equity in such cases, according to the Judicature Act, is this—that where there is an

(1) [1895] 2 Ch. 411.
(2) W. N. (1895) 123 (10).
(3) (1889) 60 L. T. 95; 37 W. R. 330.
(4) L. R. 9 Ch. 369.
(5) (1886) 17 Q. B. D. 743.
(6) (1883) 11 Q. B. D. 711.
(7) [1895] 1 Q. B. 202.
(8) (1879) 13 Ch. D. 252.
(9) (1874) L. R. 9 Ch. 229.
(10) L. R. 9 Ch. 233.
(11) 31 Ch. D. 291.

obstacle at law to the delivery of land in execution, by virtue of a writ of elegit, the Court will assist the judgment creditor by an order giving him a charge on the land. So here, there is an obstacle in law, because, the estate of the judgment debtor being an estate in remainder, there is no means at law by which the remainder can be sold. This therefore is a case in which, according to *Hatton* v. *Haywood* (1), the making by the Court of Equity of an order appointing a receiver is a "delivery in execution" of the land within the meaning of s. 1 of the Act of 1864, and entitles the judgment creditor to present a petition for sale under s. 4.

F. J. Lampard, for the respondents, Mrs. Harrison and Mrs. Bottomley, was not called upon.

LINDLEY M.R. I am sorry we cannot grant this application. If we could, we would. The difficulty arises in this way. The defendants are persons entitled to legal remainders in real estate devised to them by this testator, and Mr. Woods, the appellant, has obtained a judgment against them and cannot get his money. The question is whether he can, whilst their interests are reversionary, obtain a sale of their reversionary estates. He has obtained from the Probate Court an order appointing a receiver, and I am not now going to question that order. So long as it stands that order is by no means nugatory, and for the present purpose I assume it is unobjectionable. I take it that if these ladies were to sell or attempt to sell their reversionary estates and Mr. Woods were to know of that, he could stop it, for that order would operate as an injunction against their obtaining the money, so that it appears that this order is by no means worthless, but it is not a charge. What we are asked to say is, first, that under the order for payment of costs there is a charge; and secondly, that in consequence of the appointment of a receiver the land of these ladies is actually delivered in execution. I dissent from both those propositions. If the question depended simply upon whether the order constituted a charge under the Act 1 & 2 Vict. c. 110, I should say that Mr. Woods had a charge affecting

(1) L. R. 9 Ch. 229.

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their legal remainders; but then comes the Act 27 & 28 Vict. c. 112, s. 1, which says: "No judgment . . . . to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment." The order for payment of costs really cannot then be in itself a charge, for a judgment is not to "affect any land . . . . until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority." Now I agree that "a writ of elegit or other lawful authority" would include an order appointing a receiver such as we have here; but then comes the question whether, when this is land of which these ladies have no possession at all, the receiver can be regarded as having had the land actually delivered to him in execution. To that I answer "No." There is that difficulty in the way, and North J. has felt that difficulty, and we have also felt it before now in both of the cases that have been cited to us to-day in *In re Hamilton* (1) and in *In re South* (2), and also in *Cadman* v. *Cadman* (3)—a difficulty which prevented us from doing what we were asked to do. Having regard to those cases and the reasons we have given, it appears to me that we are now asked to do what we have no jurisdiction to do.

There is nothing really in the cases cited by Mr. Stevenson which in any way affects that view, and though perhaps there are two cases to which he has referred which might at first sight appear to be favourable, the point was not raised. As to those cases, *In re Jones* (4), and *Re Cooper* (5), I doubt whether they were decisions upon reversionary interests at all: they are so reported that I cannot tell, and therefore I cannot act upon them. Apart from them there is not a semblance of authority to justify us in reversing the order of North J., and this appeal must therefore be dismissed with costs.

RIGBY L.J. I agree, and for the same reasons. I will not add anything at any length to what the Master of the Rolls has

(1) 31 Ch. D. 291.
(2) L. R. 9 Ch. 369.
(3) (1886) 33 Ch. D. 397.
(4) W. N. (1895) 123 (10).
(5) 60 L. T. 95; 37 W. R. 330.

said, but I do say this, that, as to the case of *Re Cooper* (1) which has been mentioned, it appears to me there is nothing in the order to justify the suggestion that there was a reversionary interest being dealt with.

It is said that in *In re South* (2) James L.J. departed from what had been said in the earlier cases, and laid down a rule that a remainder means one thing and a reversion another. That seems quite unintelligible. What he does say is perfectly sound and intelligible and what one would expect from so learned and accurate a judge—that when a man is said to be seised of a reversion that must mean he has a reversion which gives him the seisin of property, and that can only be the case where there is a tenant under a term. He says nothing else. If it were a remainder, that is, an estate expectant on the determination of a prior estate of freehold, that would be a different matter. It is not a remainder in the eye of the law when there is only a reversion on a lease. The possession of an estate subject to a lease is in fact a seisin, and that is what James L.J. said. A man may have a reversion on a freehold, but he cannot be said to be really seised of that reversion at all.

VAUGHAN WILLIAMS L.J. I agree. The explanation of the cases to which Mr. Stevenson has called our attention as to the effect of an order appointing a receiver amounting to a delivery in execution under the Act of 1864 is that those cases were, one and all, cases where the judgment debtor had a present seisin of, or a present interest in, the land. I quite agree with Mr. Stevenson that the cases do shew that the mere intervening of some legal impediment which does not affect the ownership but does affect the right to the present possession, like a lien or an incumbrance of some sort, does not prevent the receivership order amounting to a delivery in execution within the meaning of the statute of 1864. The only thing I should like to add is that there is one case which was not cited, *Macnicoll* v. *Parnell* (3), where a judgment debt remained unsatisfied for want of goods of the defendant who was entitled

(1) 60 L. T. 95; 37 W. R. 330. (2) L. R. 9 Ch. 369.
(3) (1887) 35 W. R. 773.

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expectant on the death of a tenant for life to a legacy for a larger amount than the debt: there it was held that a receiver should be appointed by way of equitable execution to receive a sufficient portion of the legacy when it should become receivable. I have not looked at the judgment in that case very carefully, and our attention was not called to it; but whatever was the effect of that case, the interest there was not an interest in land at all, and therefore it cannot be regarded as an authority that a legal remainder in real estate constitutes a sufficient present interest in land to justify the appointment of a receiver with a view to realization.

Solicitors: *Clinton & Co.; F. Hatton, for C. T. Rhodes, Halifax.*

G. I. F. C.

C. A. 1899 *Jan.* 30.

VESTRY OF ST. MARY, BATTERSEA *v.* COUNTY OF LONDON AND BRUSH PROVINCIAL ELECTRIC LIGHTING COMPANY, LIMITED.

[1896 B. 5215.]

Local Authority—Vesting of Streets—Subsoil—Extent of Ownership—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 96—*Illegal Breaking Up of Street—Mandatory Injunction.*

Held, that the decision of the House of Lords in *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, as to the extent to which the soil of a street is vested in a local authority, under s. 149 of the Public Health Act, 1875, applies to the similar vesting in a local authority under s. 96 of the Metropolis Management Act, 1855, so that the soil of a street is vested in a vestry under s. 96 only so far "as is necessary for the control, protection and maintenance of the street as a highway for public use."

An electric lighting company had illegally broken up the surface of a street within the district of a vestry in the metropolis, and placed their pipes and wires at a depth of about two feet below the surface:—

Held, that the vestry were not by virtue of s. 96 the owners of the soil of the street at that depth, and that, although the company had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the company to remove their pipes and wires, there being no continuing trespass upon or interference with any right of the vestry.

Decision of Jeune P. (to whom the above case was not cited) reversed.

APPEAL by the defendants against a decision of Jeune P., sitting as an additional judge of the Chancery Division.

The plaintiff vestry had the management and control of all streets situate within the parish of St. Mary, Battersea, and by s. 96 of the Metropolis Management Act, 1855, all those streets were vested in them for that purpose.

A portion of the west side of a street called Trinity Road, Battersea, was thus vested in the plaintiffs.

Under the provisions of the Electric Lighting Acts, 1882 and 1888, and of the Wandsworth Electric Lighting Order, 1892, which was confirmed by the Electric Lighting Orders Confirmation (No. 5) Act, 1892 (55 & 56 Vict. c. ccxxvii.), the defendant company were authorized to supply electrical energy for the purpose of electric lighting within the district of the board of works for the Wandsworth district; but they were not authorized to supply electrical energy within the parish of St. Mary, Battersea, or to lay any cables or wires for that purpose within that parish. That parish immediately adjoined the district of the Wandsworth Board.

The defendants applied to the plaintiffs for permission to lay their cables under the footpath of a portion of Trinity Road, which was within the plaintiffs' parish. The plaintiffs refused to give the permission. The defendants thereupon, on the night of Sunday, October 18, 1896, without any previous notice to the plaintiffs, broke up the footpath of the above portion of Trinity Road, and laid thereunder, at a depth of about two feet below the surface, a line of pipes for the purpose of holding electrical cables and wires, intended to be used by the company for the supply by them of electrical energy. The defendants completed the laying of these pipes on the following day without any consent of the plaintiffs.

On December 18, 1896, this action was commenced, and by it the plaintiffs claimed—(1.) a declaration that the defendants were not entitled, without the consent of the plaintiffs, to open or break up any streets situate within the boundary of the parish of St. Mary, Battersea, vested in or under the control of the plaintiffs, for the purpose of laying thereunder, or to lay down under any such streets, electrical cables, or wires, or pipes, or receptacles for holding any such cables or wires; (2.) an injunction to restrain the company from laying down, or using

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or permitting to remain, any electrical cables, or wires, or any pipes or receptacles for holding such cables or wires, under that portion of Trinity Road which was within the parish of St. Mary, or under any other streets or portions of streets within the same parish, and from opening or breaking up any of such streets for the purpose of laying down any such cables or wires as aforesaid; (3.) damages for the trespasses of the company upon Trinity Road.

The defendants by their defence denied that they had acted wrongfully; but at the trial it was admitted that they had acted wrongfully in breaking up the footpath. It was contended on their behalf that the plaintiffs were not entitled to a mandatory injunction compelling the company to remove their pipes and wires, on the ground that there was no continuing interference with any right of the plaintiffs.

The learned President held that the subsoil where the defendants' pipes and wires were was vested in the plaintiffs, and that they were, as owners of the subsoil, entitled to the relief which they claimed. And he made a declaration of right, and granted an injunction, in the terms mentioned in the statement of claim.

The decision of the House of Lords in *Tunbridge Wells Corporation* v. *Baird* (1) was not cited to the learned judge.

The defendants appealed from the judgment so far as it granted a mandatory injunction.

Cripps, Q.C., and *Joseph Shaw*, for the defendants. There are two questions—(1.) whether the defendants were acting within their statutory powers in what they did; (2) whether the plaintiffs are entitled to a mandatory injunction. It was admitted in the Court below that the defendants' statutory powers under their provisional order did not enable them to lay down their wires outside their own district, even for the purpose of supplying electricity within that district.

But the question remains, whether the continuance of the defendants' wires at such a depth below the surface is a trespass upon any interest of the plaintiffs—whether the plaintiffs have

(1) [1896] A. C. 434.

any interest in the subsoil at that depth. If the plaintiffs have an interest in it, it is not disputed that *Goodson* v. *Richardson* (1) applies, and that the plaintiffs are entitled to a mandatory injunction. But that case does not apply, for the plaintiffs are not the owners of the subsoil at the depth at which the defendants have laid their wires. The subsoil at that depth belongs to the owner of the adjoining land. In *Tunbridge Wells Corporation* v. *Baird* (2), the House of Lords held that, under s. 149 of the Public Health Act, 1875, the vesting of a street in a local authority vests in them, as Lord Herschell said (3), "such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." This case was not cited in the Court below. It applies to the present case, for s. 96 (4) of the Metropolis Management Act, 1855, is expressed in substantially the same words as s. 149 of the Public Health Act. Only the surface of the road—that is, the artificial surface or made ground—vests in the local authority. They have no general powers over the natural soil, though specific powers for specific purposes are conferred upon them: ss. 68, 69 of the Metropolis Management Act, 1855. There is not now any trespass by the defendants upon any right of the plaintiffs, though the defendants may have been trespassers when they broke up the surface. That trespass is at an end, and there is no continuing trespass. The defendants have no objection to the declaration that they are not entitled to break up the surface without the consent of the plaintiffs; they only object to the mandatory injunction.

[LINDLEY M.R. referred to *Rolls* v. *Vestry of St. George the Martyr, Southwark*. (5)]

(1) (1874) L. R. 9 Ch. 221.

(2) [1896] A. C. 434.

(3) Ibid. 442.

(4) By s. 96, "all streets being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."

(5) (1880) 14 Ch. D. 785, 796.

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Wandsworth Board of Works v. *United Telephone Co.* (1) also shews the extent of the vesting under s. 96.

Bray, Q.C., and *C. Lyttelton Chubb*, for the plaintiffs. The plaintiffs have either (1.) a statutory property in the subsoil, or (2.) a statutory right of control over it. In one way or the other they are entitled to maintain the action. In *Tunbridge Wells Corporation* v. *Baird* (2) the appellants had to make out that the subsoil was theirs, and that all the rights of the former owner had been ousted; and the House of Lords held that, to the extent necessary for the plaintiff's claim, his rights had not been ousted. Here it is enough for the plaintiffs to shew that they have the control and management. If necessary, we should contend that under s. 96 the subsoil of the street vests in the local authority, at any rate to the depth at which water-pipes are usually laid. And, indeed, the plaintiffs have obtained statutory powers to light their district by electricity. If the defendants are right, they might lay down their wires without the knowledge of the plaintiffs and the public safety might be imperilled, and the plaintiffs might not be able to recover more than a farthing damages. The House of Lords in the *Tunbridge Wells Case* (2) did not overrule the previous decisions, which are all in the plaintiffs' favour: *Coverdale* v. *Charlton* (3); *Fareham Local Board* v. *Smith.* (4)

[RIGBY L.J. referred to *Barlow* v. *Vestry of St. Mary Abbotts, Kensington.* (5)

VAUGHAN WILLIAMS L.J. referred to *Cooper* v. *Wandsworth Board of Works.* (6)]

Coverdale v. *Charlton* (3) was approved and followed by this Court in *Wandsworth Board of Works* v. *United Telephone Co.* (1) These older authorities have not been superseded by the decision of the House of Lords in the *Tunbridge Wells Case.* (2) The plaintiffs are not seeking to take away any of the rights of the adjoining landowner. The question is, what are the rights of the plaintiffs against a trespasser? There has clearly been to some extent a trespass by the defendants, and,

(1) (1884) 13 Q. B. D. 904.
(2) [1896] A. C. 434.
(3) (1878) 4 Q. B. D. 104.
(4) (1891) 7 Times L. R. 443.
(5) (1886) 11 App. Cas. 257.
(6) (1863) 32 L. J. (C.P.) 185.

as they have acted wrongfully, the Court should look at their conduct as a whole. They deliberately trespassed after the vestry had refused to give them leave to lay their pipes and wires. The plaintiffs are clearly entitled to an injunction to restrain such acts in the future, and after such deliberately lawless conduct the Court will grant a mandatory injunction to compel the removal of the defendants' pipes and wires, even though there may be now no continuing trespass or injury. Under s. 13 of the Wandsworth Electric Lighting Order of 1892, "where the exercise of any of the powers of the undertakers in relation to the execution of any works . . . . will involve the placing of any works in, under, along, or across any street or public bridge the following provisions shall have effect," namely, (*a*) the undertakers must serve a month's notice on the Postmaster-General, the local authority, and the county council; (*b*) the Postmaster-General or the local authority or the county council may approve, subject to amendments or conditions, or may disapprove; (*c*) an appeal to the Board of Trade is provided; (*e*) the undertakers shall not be entitled to execute any such works, except so far as approved by the Postmaster-General and the local authority and the county council, or by the Board of Trade; (*f*) if the undertakers make default in complying with any of the requirements of this section they shall make full compensation to the Postmaster-General and the local authority and the county council for any loss or damage, and also be liable to a penalty for every such default. If the vestry have a right of control over the street they can require the removal of the defendants' pipes and wires, as well as authorize their being laid down, and they can apply to the Court to order their removal.

Cripps, Q.C., in reply. The question is, whether there is any continuing wrongful act by the defendants as regards the plaintiffs. As regards the vesting of the subsoil, that is disposed of by the *Tunbridge Wells Case* (1), which shews clearly that it does not vest in the vestry. If it did, it would not have been necessary for the Legislature to give the local authorities the powers of control which they have given them, e.g., by

(1) [1896] A. C. 434.

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s. 98 of the Act of 1855. If the local authority were the owners of the subsoil it would not have been necessary to give them special powers.

[VAUGHAN WILLIAMS L.J. referred to *Crossman* v. *Bristol and South Wales Union Ry. Co.* (1)]

As to s. 13 of the defendants' Order of 1892, it applies only to the district within which they are authorized to lay their pipes and wires, i.e., the Wandsworth district; it has no application to Battersea, which is outside their district.

Bray, Q.C., referred to s. 109 of the Metropolis Management Act, 1855, which provides that "No company or person shall break up or open the pavement, surface, or soil of any street, the paving whereof is under the control and management of the vestry or district board of any parish or district, for the purpose of making and laying down any main of pipes, or for any other purpose whatsoever, except in cases of emergency arising from defects in pipes or other works, without having previously given three clear days' notice in writing to such vestry or district board, ... and every company or person offending against this enactment shall for every such offence forfeit a sum not exceeding 5*l.*, and shall, within twenty-four hours after notice in writing from the vestry or district board, cause such mains of pipes to be taken up and removed, and the pavement, surface, or soil to be reinstated and put into its former state. . . . ."

The omission of the defendants to comply with a notice, given to them by the vestry under this section, to remove their pipes and wires, would justify the granting of a mandatory injunction.

LINDLEY M.R. The case is not altogether satisfactory, and I will begin by saying that I do not think we are in a position to grant a mandatory injunction upon the footing that a notice given by the plaintiffs under s. 109 has not been complied with. As to what the position would have been if that had been done, and relief had been sought upon that footing, I will say nothing. That question is not before us; but s. 109 is a very

(1) (1863) 1 H. & M. 531.

important one for the appellants to consider. As to whether it cannot even now be enforced against them, I will say nothing. This action is not brought, and cannot fairly be interpreted as having been brought, to enforce that section.

Having so far cleared the ground, I must say that I think the argument of the appellants is well founded. The action, so far as we are concerned with it, is for a mandatory injunction only. Although in form the defendants have appealed against the whole of the judgment, the appeal as regards the declaration of right and the injunction restraining future interference with the surface of the street has not been pressed. The appeal has been confined to the mandatory injunction—in other words, to that part of the order which restrains the defendants from using their electric pipes and wires or permitting them to remain.

Now the case stands thus. Some time in 1896 the defendants, after failing to come to terms with the Battersea Vestry, and knowing perfectly well that the vestry would object to their laying down their pipes under their streets, took the law into their own hands, and wilfully and in a very high-handed manner broke up the street for about thirty yards, and laid down their electric mains under it, outside their statutory district and in excess of their statutory powers, and they got the work done on a Sunday night. That, of course, was all wrong —utterly and entirely illegal—and the fact that the conduct of the company was in that respect utterly and entirely illegal is a great temptation to us to be equally high-handed with them, and to say to them summarily, "You had no business to put your mains there; you must take them up again." But we cannot do that; we must consider the rights of the parties, and, when we are asked to grant a mandatory injunction, we must see whether any rights of the plaintiffs are being interfered with by the continuance of these pipes in the place in which they are.

It is contended that the rights of the plaintiffs are being interfered with, and this is put in two ways. It is said, first, that these electric wires are only two feet beneath the surface of the street—that is, under the foot pavement of it, and that

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the subsoil of the street, for the depth of at least two feet, is vested in the plaintiffs. If that is so, of course the plaintiffs are right, and this is a continuing trespass and violation of their rights of ownership. But it seems to me that the answer to that is to be found in *Tunbridge Wells Corporation* v. *Baird* (1), a case which gave rise to much discussion both in this Court and in the House of Lords, and in which the extent to which the soil of a street was vested in a local authority was very fully considered. There were several prior decisions, and it is not always easy to see to what extent by an Act of Parliament the soil of a street is vested in a local authority. In the *Tunbridge Wells Case* (1) the contest was between a local authority and the owner of the soil under a street or public place. The decision at the trial of the action was in favour of the local authority; but both the Court of Appeal and the House of Lords decided in favour of the owner of the soil, and against the local authority. Here the controversy does not arise in the same shape; but still the observations made by the House of Lords in that case—observations essential to the decision then given with reference to s. 149 of the Public Health Act, 1875—apply equally to s. 96 of the Act now in question, which is not substantially different. Lord Herschell said (2): "The vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." If that is so, if the pavement which the plaintiffs have vested in them carries with it only so much of the soil under this street as falls within that definition, they clearly cannot maintain this action as owners of the soil under the pavement. If that is so, one of the most formidable grounds upon which the plaintiffs base their case is disposed of.

But the plaintiffs say, "Even if we are not the owners of this subsoil, we have some statutory control over it, and that control is interfered with by the continuance of the defendants' pipes." I was much struck at first with the argument based on s. 13 of the defendants' provisional order, confirmed by the Act 55 & 56 Vict. c. ccxxvii. But the answer to that argument is

(1) [1896] A. C. 434. (2) [1896] A. C. 442.

conclusive—namely, that that section has no application to the locus in quo. If this had been an exercise by the defendants of their right within their statutory limits, that section would have applied; but it is not, and that section has no application to Battersea. We are driven, therefore, to the sections of the general Act, and the answer to them is that Mr. Bray has not pointed out (and I do not suppose he can point out) any section giving the vestry a statutory control which cannot be exercised even if the defendants' pipes remain where they are. Take the most important or the most typical section—s. 98 of the Metropolis Management Act, 1855—which enables the local authority to lower the surface of the streets. The defendants' pipes do not in any way interfere with this power of control, and the same may be said of the other statutory powers of the vestry.

I feel bound, therefore, to come to the conclusion—I do so with regret, for I would rather, if I could, come to the opposite conclusion, considering the conduct of the defendants—that the plaintiffs have not made out that any right of theirs is being interfered with by the continuance of the defendants' pipes in the place in which they are. The order for a mandatory injunction must, therefore, be discharged.

Apart from s. 109, as to which I say nothing, I cannot see that any right of the plaintiffs is now interfered with.

RIGBY L.J. I am of the same opinion. I need not refer to s. 109 at this stage of the litigation, and therefore I shall say nothing about it. With reference to the only ground on which it can be contended that the soil of the locus in which the pipes are is vested in the vestry, I think it is concluded by the decision of the House of Lords in the *Tunbridge Wells Case.* (1) The observations of the learned Lords are not in the nature of dicta, which we should be entitled to review, but are reasons given by them as the grounds of their decision, and we are bound, whatever may have been said in the earlier cases, to adopt that view. I cannot find in any of the sections which have been referred to that the existing rights of the vestry are

(1) [1896] A. C. 434.

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in any danger. I can find nothing in the nature of a continuing trespass or a continuing nuisance, and, in the absence of anything of that kind, I think that the appellants are entitled to succeed.

VAUGHAN WILLIAMS L.J. I entirely agree. The evidence before us and the admitted facts shew that the defendants adopted a very lawless and high-handed course upon the Sunday which has been referred to. They were very perverse in their conduct, and that would make me in a sense regret that we cannot properly deprive them of every advantage they gained by their lawless and high-handed conduct. But I hesitate to express that feeling of regret, because I do not know what the conduct of the local authority may have been. If throughout this matter they had remembered that they exist for the public good, I should have nothing to add to what has already been said with regard to the conduct of the defendant company. But, if the vestry have forgotten that they exist for the public good, and have refused to the defendant company a permission which could in fact have been given without any harm to the constituency (if that is the proper expression) of Battersea which they represent, and with great advantage to the inhabitants of the adjoining parish, this would remove any regret which I might otherwise have felt at being obliged to leave the defendant company in the position of advantage which they gained by their lawless conduct.

Solicitors: *S. Morse; W. W. Young & Son.*

W. L. C.

In re MORRIS.
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[1898 M. 1170.]

Bankruptcy—Proof—Bills of Exchange—Lumping Debts and Securities.

Although under ordinary circumstances a creditor proving in a bankruptcy may properly lump together his debts and securities, yet when the debts are distinct in substance, with different rights over as against third persons, or with different securities, the trustee in the bankruptcy may insist that proof shall not be made for a lump sum, and may require the creditor to distinguish and specify the particular debts and the values of the securities for the same respectively.

A bank were the indorsees of four bills of exchange, of which A and C were drawn by one person, and B and D by another person, upon different acceptors, to the order of the same payee, who indorsed them all to the same firm. That firm indorsed them to another firm, who indorsed them to the bank. The first-mentioned firm executed a creditors' deed, which provided for the distribution of their assets as in bankruptcy. The bank proved under the deed for the aggregate amount of the four bills, and, by means of dividends under the deed and payments by the other persons liable upon the bills, they received in respect of the bills B and D more than 20*s.* in the pound, but they had not yet received payment in full of the other two bills A and C. The whole amount which they had received was less than the total amount due on all the four bills :—

Held, that the trustee of the deed was entitled to have the bills B and D delivered up to him, and to have the surplus above 20*s.* in the pound which the bank had received in respect of each of those bills handed over to him.

Decision of Romer J., [1898] 2 Ch. 413, affirmed.

APPEAL against a decision of Romer J. (1)

Prior to November 29, 1894, Henry Hall and William Bates Morris carried on business in partnership, under the firm of Prowse, Hall & Morris.

On November 29, 1894, Henry Hall died.

On April 23, 1894, W. B. Morris executed a creditors' deed, by which he conveyed to a trustee all the real and personal estate of his late firm, and also all his separate property (with certain exceptions), upon trust to distribute the same as in

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bankruptcy among those creditors of the firm and of himself who assented to the deed.

The London and County Banking Company, Limited (the defendants), were parties to this deed.

At the date of the deed the defendants were the holders of the four following bills of exchange, which they had discounted:—

(A.) A bill for 2000*l.*, dated August 25, 1894, drawn by Job Brothers & Co., of St. John's, Newfoundland, upon Job Brothers, of Liverpool, payable ninety days after sight to the order of the Commercial Bank of Newfoundland. This bill was accepted by Job Brothers on September 5, 1894, and was indorsed by the Commercial Bank of Newfoundland to Prowse, Hall & Morris, and by them to W. H. Ridley & Co., and by them to the defendants.

(B.) A bill for 2000*l.*, dated September 7, 1894, drawn by Alan Goodridge & Sons, of St. John's, Newfoundland, upon Charles T. Bennett, of Bristol, payable ninety days after sight to the order of the Commercial Bank of Newfoundland. This bill was accepted by C. T. Bennett on September 18, 1894, and was indorsed by the Commercial Bank of Newfoundland to Prowse, Hall & Morris, and by them to W. H. Ridley & Co., and by them to the defendants.

(C.) A bill for 2000*l.*, dated September 22, 1894, drawn by Job Brothers & Co., of St. John's, Newfoundland, upon Job Brothers, of Liverpool, payable ninety days after sight to the order of the Commercial Bank of Newfoundland. This bill was accepted by Job Brothers on October 7, 1894, and was indorsed by the Commercial Bank of Newfoundland to Prowse, Hall & Morris, and by them to W. H. Ridley & Co., and by them to the defendants.

(D.) A bill for 1000*l.*, dated October 20, 1894, drawn by Alan Goodridge & Sons upon C. T. Bennett, payable ninety days after sight to the order of the Commercial Bank of Newfoundland. This bill was accepted by C. T. Bennett on October 31, 1894, and was indorsed by the Commercial Bank of Newfoundland to Prowse, Hall & Morris, and by them to W. H. Ridley & Co., and by them to the defendants.

The several indorsements were made at various dates, and

each of them was made in the ordinary course of business and for value.

There was no agreement between Prowse, Hall & Morris and any of the prior parties to the bills affecting the legal liability of those prior parties on the bills to Prowse, Hall & Morris.

The Commercial Bank of Newfoundland, Job Brothers, C. T. Bennett, and Alan Goodridge & Sons became bankrupt or entered into liquidation, and the defendants had proved on their respective estates for the amounts due upon the bills to which they were respectively parties.

On September 26, 1896, W. H. Ridley & Co. paid to the defendants, in respect of the four bills, the sum of 615*l.* 18*s.* 3*d.*, which formed part of the estate of Prowse, Hall & Morris, and had come into the hands of W. H. Ridley & Co. It was admitted that this sum was properly payable to the defendants in respect of the bills held by them. With this exception nothing had been paid by W. H. Ridley & Co. in respect of the four bills or any of them.

The defendants in September, 1896, claimed under the creditors' deed against the estate of Prowse, Hall & Morris for the aggregate amount of the four bills, with noting expenses, after deducting the sum of 615*l.* 18*s.* 3*d.* which they had received from W. H. Ridley & Co.

Up to May 19, 1898, the defendants had received by payments from the various persons liable upon the bills (including the estate of Prowse, Hall & Morris)—

	£	*s.*	*d.*
In respect of bill A (2000*l.*) . . .	1511	16	10
In respect of bill C (2000*l.*) . . .	1511	16	10
In respect of bill B (2000*l.*) . . .	2495	6	6
In respect of bill D (1000*l.*) . . .	1247	11	8

The amount received from the estate of Prowse, Hall & Morris in respect of bill B, including the apportioned part of the 615*l.* 18*s.* 3*d.* paid by W. H. Ridley & Co., was 540*l.* 18*s.*, and in respect of bill D 270*l.* 10*s.* 5*d.*

The total amount received by the defendants in respect of bill B exceeded the amount due in respect of that bill by

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373*l.* 2*s.* 4*d.*, and in respect of bill D exceeded the amount due in respect of that bill by 192*l.* 19*s.* 6*d.*

The defendants had not yet received payment in full of the two bills A and C, and the total amount which they had received in respect of the four bills was less than the aggregate amount due upon those bills.

Upon a summons taken out by the trustee under the deed, as plaintiff, against the banking company, as defendants, Romer J. made a declaration that the plaintiff was entitled to be repaid by the defendants the two sums of 373*l.* 2*s.* 4*d.* and 192*l.* 19*s.* 6*d.*, being the total amounts received by the defendants in respect of the two bills B and D in excess of the amounts of those bills respectively, with noting expenses and interest, and to the delivery over of those bills, and ordered the defendants forthwith to pay to the plaintiff those two sums, and to deliver up to him the two bills B and D accordingly.

The defendants appealed.

Neville, Q.C., and *Muir Mackenzie*, for the defendants. The bank are entitled to consolidate their whole claim—to lump their debts and the bills which they hold as security. The trustee has no right to insist that each bill shall be treated separately. *In re Barned's Banking Co.* (1) does not apply, because here there is no security for the bills. A trustee has no right to split up the dividend which he pays. A creditor has a right to receive dividends from all the persons who are liable until he has been paid 20*s.* in the pound: *Ex parte Bloxham.* (2) There can be no adjustment of the rights of the co-sureties until the debt has been paid in full: *Ex parte Gifford.* (3)

[VAUGHAN WILLIAMS L.J. referred to Robson's Bankruptcy, 7th ed. p. 259.]

In *Ex parte Sammon* (4) bills were given as collateral security for a debt of the drawer of larger amount, and the drawer and the acceptor both became bankrupt. It was held that the

(1) (1874) L. R. 19 Eq. 1; (1875) L. R. 10 Ch. 198.
(2) (1801) 6 Ves. 449.
(3) (1802) 6 Ves. 805.
(4) (1832) 1 D. & Ch. 564.

creditor was entitled to receive 20*s.* in the pound out of the estate of the acceptor, and also to prove the debt against the estate of the debtor, and to receive dividends from that estate in liquidation of the remainder of the debt. In *In re Joint Stock Discount Co.* (1) it was held that a creditor, who had a right of proof for the same debt against the estates of two companies in liquidation, could receive dividends from both estates, until the full amount of his debt and interest had been satisfied. Until 20*s.* in the pound has been paid in respect of the whole debt the trustee has no right to have anything refunded. In *In re Smith & Logan* (2) it was held that the practice for a proving creditor to lump debts and securities is primâ facie legal and proper, though the trustee has a right to call on the creditor to value any particular security. Hall, Prowse & Morris having become bankrupt, the bank have but one claim against their estate, and their trustee cannot take into account the liability of any other estate for the debt, until the bankrupts' estate has paid 20*s.* in the pound upon the whole debt. The right of a creditor in the bankruptcy of his debtor is a statutable execution—a right to a share of the bankrupt's estate; it is a right of property, not merely a right as creditor.

Levett, Q.C., and *F. Thompson*, for the trustee. The claim of the bank really comes to this—that a creditor who has two debts, the one secured and the other unsecured, may get the benefit of his security for the unsecured debt. A creditor cannot be allowed to take a good security and apply it to the payment of a debt for which he has a bad security.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Brunskill* (3); *Ex parte Burn.* (4) The basis of the decision there was, that the bills held as security were part of the bankrupt's estate.]

In *Ex parte Barratt* (5) a creditor proved in respect of several bills of exchange drawn by the bankrupt and discounted by the creditor. One of the bills was subsequently paid in full by the acceptor, and it was held that so much of the proof as related to that bill must be expunged. Each separate debt

(1) (1869) L. R. 5 Ch. 86.
(2) (1895) 2 Manson, 70.
(3) (1835) 4 D. & Ch. 442.
(4) (1814) 2 Rose, 55.
(5) (1823) 1 G. & J. 327.

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having a separate security must be treated separately. No right of consolidation arises by reason of the bankruptcy.

[VAUGHAN WILLIAMS L.J. There is no security here on any part of the bankrupts' estate.]

The acceptor and all the prior indorsees are bound to indemnify the bankrupts and their estate. This right of indemnity is part of the bankrupts' estate. If the bankrupts' estate pays the bills, it will have a right to prove for what it pays against all those who are liable upon the bills in priority. The bills were not deposited with the bank as security for any debt; the debt arose simply upon the bills. If the proofs had been made on four separate pieces of paper the trustee would plainly have been entitled to what he asks; the mere fact that the proof is made on one piece of paper cannot alter his rights. When a dividend is paid, it is by law rateably appropriated to every part of the debt: *Paley* v. *Field.* (1) When the amounts of several bills are proved in one entire sum, and there are different rights over in respect of each bill, the dividend paid must be treated as paid rateably in respect of each. The practice stated in *In re Joint Stock Discount Co.* (2) does not affect the present case.

Muir Mackenzie, in reply. *Ex parte Barratt* (3) is distinguishable. There is no question here of security upon the property of the bankrupts. The bank are merely holders of the bills. When the obligation upon the bills is converted into statutory execution, the trustee has no right to inquire what payments have been made by the other obligees. In *Paley* v. *Field* (1) the question was as to the rights of a surety who had paid part of a debt.

LINDLEY M.R. I think the view taken by Romer J. was right. Looking at the substance of the case, one cannot doubt that, although there is one proof for 7000*l.*, it is in substance a proof on the four bills. It was a mere matter of convenience that they were lumped together. Under ordinary circumstances, of course, that would not matter, and would simplify the accounts, but it cannot alter the rights of the parties.

(1) (1806) 12 Ves. 435. (2) L. R. 5 Ch. 86. (3) 1 G. & J. 327.

Now, when we look at these four bills it appears to me that it is important to trace out the persons from whom dividends have been obtained in respect of them. There are two sets of bills—two accepted by Job Brothers of Liverpool, and two accepted by C. T. Bennett of Bristol. The drawers of the first two were Job Brothers of Newfoundland, the drawers of the others were Alan Goodridge & Sons. All the four bills were drawn in favour of the Commercial Bank of Newfoundland; all the four were indorsed by that bank to Prowse, Hall & Morris, who executed a creditors' deed; all the four were indorsed by Prowse, Hall & Morris to Ridley & Co., who indorsed them all to the London and County Bank. That bank had no claim at all against the estate of Prowse, Hall & Morris, except as the holders of these bills. The bank were not creditors of Prowse, Hall & Morris on any separate account, holding these bills as collateral security.

What, then, was their right of proof as against Prowse, Hall & Morris? Their right was to prove on the four bills, and they had no other right. Of course it might have happened that there was no necessity for keeping the bills separate; but, as the moneys which have been paid in respect of these bills have been paid by different persons, it becomes necessary to consider who those persons are, and, when we look at the details which are given, we do not find a single payment made by any one except persons who were under liability to pay to Prowse, Hall & Morris. Take the bills drawn by Job Brothers—I do not know whether they were two firms or one—but they were liable either as acceptors or drawers. Of the other two bills Bennett was the acceptor, and Goodridge & Sons were the drawers. Then Ridley & Co. made a payment out of funds belonging to Prowse, Hall & Morris which were in their hands (that counts for nothing), and so on. There is not a single payment made by any one except in discharge of his own obligation to the bankrupts.

That being so, it would appear to me very extraordinary that, because proof was admitted for one sum of 7000*l.*, instead of for four sums aggregating to that amount, the rights of the parties should be in any way altered; and I think Romer J.

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was quite right. We must not be misled by the mere fact that one proof has been admitted and acted upon before anything turned upon it; but, when we find that the bank have received more than 20*s.* in the pound on two of the bills under a mistake, they must account for the excess.

As regards the authorities which have been cited, I think that *Ex parte Barratt* (1) is much nearer to the present case than any of the others.

RIGBY L.J. I am of the same opinion. I think it is plain that there were really four separate proofs on four separate bills. The only right of proof which the bank had was on these bills. They could not alter that right by merely adding up the figures and lumping them together. I do not think they got, as Mr. Muir Mackenzie argued, one right of property in place of one claim. But, if that be a sound analogy, they got four rights of property in respect of the four bills.

Then as regards the equity of the matter. It cannot be doubted that it was only because the bank added up the amounts of the bills and lumped them together that they made one proof. And all the moneys paid, except those paid by Messrs. Ridley & Co., were paid in respect of claims which the bank had on the acceptors, drawers, and prior indorsees, all of whom were liable in priority to the bankrupts' estate. Ridley & Co.'s payment was made out of the bankrupts' money, and all the other payments were made in respect of obligations existing towards the bankrupts' estate. I cannot think that any rule of practice compels us to disregard the true facts.

I agree that *Ex parte Barratt* (1), when thoroughly worked out, is consistent with the other authorities, and is one which we ought to follow.

VAUGHAN WILLIAMS L.J. I entirely agree. According to bankruptcy practice, no one is entitled or allowed to take advantage of the form of a proof. If persons outside the bankrupts' estate had together paid the amount of these bills in full, the trustee in the bankruptcy would not have been entitled to make

(1) 1 G. & J. 327.

a profit for his estate out of that fact, and say to the creditors, "You have been fully paid, and therefore nothing more can be paid by my estate in respect of this debt." The answer to that would be, "Yes; but we have been fully paid by a person who has a right to stand in our shoes." Under such circumstances, although the practice in bankruptcy might not allow a person with a legal proof to receive more than 20*s.* in the pound, and might thereupon compel an outsider, who had not proved, to come in and prove in his own right, yet, if dividends had actually been paid over (as is the case here), the creditor would not be ordered to repay to the trustee dividends which would ultimately have to go into the pocket of some one else. But in the present case the persons who have made payments in respect of these bills were under an obligation towards the bankrupts and their estate to pay those amounts, and, under these circumstances, the moment the creditor has received his 20*s.* in the pound and interest (it does not much matter from what source), any surplus ought to go—not to any other person—but beneficially into the bankrupt's estate.

It seems to me clear that the order of Romer J. is perfectly right, and that the creditor who cannot be entitled to hold the surplus, and who is not accountable for it to any one else, should hand it back to the estate which is beneficially entitled to it.

LINDLEY M.R. The appeal will be dismissed with costs.

Solicitors: *Harries, Wilkinson & Raikes; Simpson, Cullingford, Partington & Holland.*

W. L. C.

C. A.
1898
ROMER J.
Oct. 29;
Nov. 22;
Dec. 7.
C. A.
1899
Feb. 11, 13, 14.

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[1898 E. 256.]

Practice—Parties—Representative Action—Action on behalf of a Class of the Public—Rules of Supreme Court, Order XVI., *r.* 9; *Order* XXV., *r.* 5.

The plaintiffs (six in number) sued on behalf of themselves and all other the growers of fruit, flowers, vegetables, roots and herbs, within the meaning of the Act for the Regulation of Covent Garden Market (9 Geo. 4, c. cxiii.), to enforce certain preferential rights to stands in the market, which they alleged to have been given to the class of growers by the Act. The sole defendant was the lord of the market:—

Held (Vaughan Williams L.J. dissenting), that there being a bonâ fide question as to the construction of the Act, the plaintiffs, as representing the class of growers, who had an interest in common, could maintain the action, but that the Attorney-General must be added as a defendant to represent the rest of the public who were interested in disputing the alleged preference:

Held, by Vaughan Williams L.J., that the growers had not a community of interest in the subject-matter of the action, but (agreeing with the rest of the Court) that, if the plaintiffs could maintain the action as representing a class, the Attorney-General must be made a party.

Decision of Romer J. reversed.

THIS action was brought by John Ellis, William Gray, Henry Miller, George Percy Ashby, Daniel Pullinger, and William Peacock "on behalf of themselves and all other the growers of fruit, flowers, vegetables, roots or herbs within the meaning of the Act 9 Geo. 4, c. cxiii.," as plaintiffs, against the Duke of Bedford.

The Duke was the lord of Covent Garden Market, which was vested in him in fee simple; the Act referred to was passed in 1828 "for the improvement and regulation of Covent Garden Market."

The Act by s. 3 authorized the then Duke, his heirs or assigns, being owners of the market, to take down the shops and other buildings then standing in the market, and to divide, arrange, and appropriate the site or area of the market in the manner shewn upon a plan deposited in the Parliament Office, and also to build such shops and other buildings as the Duke, his heirs

or assigns, being owners of the market, should think fit on such parts of the market as were marked with the letter (A) in the plan.

Sect. 6 authorized the Duke, his heirs or assigns, being owners of the market, to let any of the shops, buildings, &c., to be erected by the year, or for any shorter period, and at such rents as they should think fit, to be used and occupied only by persons dealing in or selling fruit, flowers, vegetables, roots, seeds or herbs therein.

By s. 7, "The remainder of the said market shall, subject to the provisions hereinafter contained, be appropriated as follows, viz. (inter alia)—

"Those parts thereof which are marked respectively in the said plan with the letter (B) shall be divided into stands, which stands shall be called 'the casual cart stands,' and shall (except and subject as hereinafter mentioned) be exclusively appropriated to the reception of waggons and carts in which fruit, flowers, vegetables, roots, or herbs shall be brought to the said market for sale, and for the exposing to sale and selling such fruit, flowers, vegetables, roots, or herbs on the stand to which the same shall be brought, subject to such tolls or sums of money as are in the schedule to this Act in that behalf mentioned; and the growers of fruit, flowers, vegetables, roots, or herbs shall be deemed to be the persons having the preferable right to resort to such stands under the provisions of this Act.

"Those parts of the said market which are marked respectively in the said plan with the letter (C) shall be divided into stands, which stands shall be called 'the yearly cart stands,' and shall (except and subject as hereinafter mentioned) be exclusively appropriated to the reception of waggons and carts of or belonging to growers of fruit, flowers, vegetables, roots, or herbs, and to the exposing to sale and selling the fruit, flowers, vegetables, roots, or herbs grown or reared by such growers, and be let by the said Duke, his heirs or assigns, being owners of the said market, or their tenants thereof, by the year or for any shorter period, at such yearly or other rents, and subject to such tolls or sums of money, as are in the schedule

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to this Act in that behalf mentioned; and the person to whom any such stand shall be let shall be deemed to be the holder thereof, and the person having the preferable right to resort thereto, under the provisions of this Act."

"Those parts of the said market which are marked respectively in the said plan with the letters (F and G) shall be divided into stands, which stands shall be called 'the yearly pitching stands,' and shall, except and subject as hereinafter mentioned, be exclusively appropriated to the exposing to sale and selling fruit, flowers, vegetables, roots, or herbs, and may be let by the said Duke, his heirs or assigns, being owners of the said market, or their tenants thereof, exclusively to growers of fruit, flowers, vegetables, roots, or herbs, by the year or for any shorter period, at such yearly or other rents, and subject to such tolls or sums of money, as are in the schedule to this Act in that behalf mentioned; and the person to whom any such stand shall be let shall be deemed to be the holder thereof, and the person having the preferable right to resort thereto, under the provisions of this Act."

"And such appropriation shall take place and be made with respect to each part of the said market respectively, as and when such part shall be altered, according to the division and arrangement hereinbefore authorized to be made."

Sect. 9: "After the said parts of the said market to be divided into the stands to be called the 'yearly cart stands,' shall be altered according to the division and arrangement hereinbefore authorized to be made, no waggon, cart, fruit, flowers, vegetables, roots, herbs, bulk, basket, package, hamper or other thing shall be placed or put in or upon any stand in those parts of the said market to be called 'the yearly cart stands,' which shall be let, but such as shall belong to or be the property of the holder of such stand, except as hereinafter mentioned; but it shall be lawful for any person to place or put any waggon or cart containing fruit, flowers, vegetables, roots, or herbs, or to place, pitch, expose for sale, or sell any fruit, flowers, vegetables, roots, or herbs, on any of the said stands to be called 'the yearly cart stands,' which shall not be let, such person paying, in respect of such placing, pitching,

exposing for sale, or selling, the toll or tolls or sum or sums of money mentioned or specified in that behalf in the schedule to this Act; and no empty or unladen waggon or cart shall be placed or left on any of such stands until after twelve of the clock at noon."

Sect. 14: "After the said parts of the said market to be divided into the stands to be called 'the yearly pitching stands,' shall be altered according to the division and arrangement hereinbefore authorized to be made, no fruit, flowers, vegetables, roots, herbs, bulk, package, hamper, or other thing shall be placed or put in or upon any stand in those parts of the said market to be called 'the yearly pitching stands,' which shall be let, but such as shall belong to or be the property of the holder of such stand, except as hereinafter mentioned; but it shall be lawful for any person to place, pitch, expose for sale, or sell any fruit, flowers, vegetables, roots, or herbs on any of the said stands to be called 'the yearly pitching stands,' which shall not be let, such person paying, in respect of such placing, pitching, exposing for sale, or selling, the rent, toll or tolls, or sum or sums of money mentioned or specified in that behalf in the schedule to this Act."

Sect. 17: "Notwithstanding anything hereinbefore contained, it shall be lawful for any person to place or put any waggon or cart containing any fruit, flowers, vegetables, roots, or herbs, and to place, pitch, expose for sale, or sell any fruit, flowers, vegetables, roots, or herbs, in or upon any stand in those parts of the said market to be called 'the casual cart stands' or 'the yearly cart stands,' whether such stand shall be let or not, for and during such time as such stand shall be unoccupied or vacant, but subject and without prejudice to the right of the growers having the preferable right under the provisions of this Act to resort to such stand as hereinbefore provided; which person so placing or putting such waggon or cart, or so placing, pitching, exposing for sale, or selling fruit, flowers, vegetables, roots, or herbs, on such stand, shall pay to the said Duke, his heirs or assigns, being owners of the said market, or their tenants thereof, such toll or sum of money as is mentioned or specified in that behalf in the schedule to this Act, and shall

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and is hereby required to remove from such stand the waggon, cart, goods, and other articles placed by him or her on such stand, when and so often as any person having a preferable right to resort to such stand under the provisions of this Act shall have occasion to occupy the same."

Sect. 21: "From and after the passing of this Act it shall be lawful for the said Duke, his heirs or assigns, being owners of the said market, and their tenants thereof, to demand and take, or cause to be demanded and taken, of and from all and every person and persons who shall place, pitch, expose for sale, or sell within the said market any fruit, flowers, vegetables, roots, or herbs, all such toll or tolls as at the time of the passing the before-recited Act of the 53rd year of the reign of His late Majesty King George the third was or were usually taken or collected within the said market, or was or were usually payable for or in respect of the same; and when and as any part or parts of the said market shall be altered according to the division and arrangement hereinbefore authorized to be made, it shall be lawful for the said Duke, his heirs or assigns, being such owners as aforesaid, and their tenants of the said market, at all times thereafter to demand and take, or cause to be demanded and taken, of and from every person who shall hold, use, or occupy any stand in such part or parts of the said market respectively, the rent or sum of money mentioned or specified with respect to such stand in the schedule to this Act; and of and from every person who shall place, pitch, expose for sale, or sell within such part or parts of the said market respectively any fruit, flowers, vegetables, roots, or herbs, on each and every day on which the same shall be so placed, pitched, exposed for sale, or sold, the toll or tolls or sum or sums of money mentioned or specified with respect to such part or parts respectively in the said schedule; and this provision, together with a copy of the schedule to this Act, shall, within two months after the passing of this Act, be painted in legible characters, and put up and exposed to public view in some conspicuous part of the said market, and shall from time to time be renewed and replaced when and as often as the same shall be obliterated or defaced."

The statement of claim set forth the above provisions of the Act and also part of the schedule as to tolls, and it contained the following allegations:—

(5.) "The market was divided and arranged in accordance with the Act shortly after the passing thereof.

(6.) "Each of the plaintiffs is a grower of fruit, flowers, vegetables, roots, and herbs, as mentioned in the said Act, and is a frequenter of the said market for the purpose of the sale thereof; and the plaintiffs sue on behalf of all such growers as mentioned in the said Act, and also on behalf of themselves severally in respect of the sums claimed to be repaid by the defendant to them respectively."

(8.) "The plaintiffs complain that the defendant does not in his management of the said market comply with the provisions of the said Act, and in particular with reference to (A) the stands called "casual cart stands," (B) the stands called "yearly cart stands," (C) the stands called "yearly pitching stands," and (D) the tolls exacted by the defendant for the use of such respective stands.

(9.) "The plaintiffs submit that the defendant has not the right to admit others to the use of the casual cart stands so long as growers present themselves and require the use thereof. The defendant makes it a practice either to refuse to growers the use of such stands, or by filling such stands with others than growers to prevent growers having the use of such stands, with the result that growers have to go to other parts of the market, or to places outside the market or to the public streets, where, the restrictions contained in the said Act not being applicable, the defendant charges higher rates than would have to be paid under the Act, and with the further result of injury to growers in their trade."

The statement of claim then alleged in detail several infringements of the Act by the defendant with reference to the yearly cart stands, and the yearly pitching stands, and with reference to the tolls charged by the defendant for the use of the casual cart stands, the yearly cart stands, and the yearly pitching stands, and gave instances of alleged overcharges.

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The plaintiffs claimed—

(1.) A declaration that the defendant was not entitled to exclude from the use of "the casual stands" growers of fruit, &c., as mentioned in the Act in favour of other persons.

(2.) A declaration that the defendant was not entitled to exclude from the use of "the yearly cart stands" such growers as aforesaid in favour of other persons, or, as to any such stand which might not be let, to refuse to let the same to a grower offering and willing to accept a letting thereof, except in case of reasonable objection to the growers so offering.

(3.) A declaration that the defendant was not entitled to exclude from the use of "the yearly pitching stands" such growers as aforesaid in favour of other persons, by refusing, in the case of any such stand which might not be let, to let the same to a grower offering and willing to accept a letting thereof, except in case of reasonable objection to the grower so offering.

(4.) A declaration that the defendant was not entitled to charge for the use of "the casual cart stands," "the yearly cart stands," and "the yearly pitching stands" respectively, any rents, tolls, or sums of money other than those specified in the schedule to the Act respectively.

(5.) A declaration that the defendant was not by virtue of the Act or otherwise entitled to charge for the use for the purposes of the exposure or sale of fruit, flowers, vegetables, roots, or herbs of any parts of the public streets adjoining the market, or of any other places adjacent to but not forming part of the market, or if within the limits of the market not within the parts by the Act appropriated for such exposure and sale, any rents, tolls or sums of money whatsoever.

(6.) An injunction or injunctions to restrain the defendant from doing any acts contrary to the declarations so claimed as aforesaid.

(7.) An account of the sums charged to and paid by each of the plaintiffs by and to the defendant for the use of such stands as aforesaid in the market, and of places outside the market, during six years before the issue of the writ, in excess of or other than the sums the defendant was entitled to charge

in accordance with the declarations claimed as aforesaid, and repayment by the defendant to each of the plaintiffs of the amount so charged to and paid by such plaintiff in excess as aforesaid.

The defendant took out a summons, asking that the writ and all other proceedings in the action might be set aside "on the ground that the action is improperly constituted, and the writ not authorized by the Rules of the Supreme Court or otherwise, and that several plaintiffs, having separate and distinct causes of action, not being in respect of or arising out of the same alleged transaction or series of transactions, are joined in the writ and action; and on the ground that the plaintiffs cannot sue in respect of the alleged causes of action on behalf of themselves, and all members of the public being growers of fruit, flowers, vegetables, roots or herbs, and that such action cannot be maintained by private individuals on behalf of such members of the public as answer the description alleged in respect of public statutory or other rights alleged. And alternatively that the plaintiffs be put to elect the name of a single plaintiff to continue the action, and that in respect of such plaintiff's personal cause of action only."

The summons came on for hearing before Romer J. on October 29, 1898.

Levett, Q.C., *Danckwerts*, and *Gwynne James*, for the defendant. The plaintiffs sue in two capacities, one personal and the other representative: as to the first, it is an action by six separate plaintiffs in respect of six separate and distinct causes of action; and as to the second, the plaintiffs have no right to represent themselves and all the other classes of growers and holders of stalls: two actions of this kind cannot be joined in one: *Stroud* v. *Lawson*. (1) This action is not within Order XVI., r. 1., which only allows several plaintiffs to join in one action distinct causes of action, if the right to relief arises out of the same transaction or series of transactions, and there would be a common question of law or fact if they brought separate actions. That is not the case here. The

(1) [1898] 2 Q. B. 44.

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only common factor in this action is the Act of Parliament: that is not enough; the action is improperly constituted, and all proceedings ought to be set aside unless the plaintiffs elect to pick out one of themselves to continue it, and then only in respect of that particular plaintiff's personal cause of action.

Farwell, Q.C., and *J. T. Prior*, for the plaintiffs. Each one of these plaintiffs has a common ground of complaint against the owner of the market. Their complaint arises out of the "same transaction" and series of transactions; this is a proper representative action on behalf of the growers as a class. The alteration of Order XVI., r. 1, to its present form was made in consequence of *Smurthwaite* v. *Hannay* (1), and the present action is now within the spirit of that rule. *Stroud* v. *Lawson* (2) does not apply: in that case there were two separate and distinct causes of action. Chitty L.J. (3) gives an illustration of a case, in which the rule would apply, where persons having separate inheritances in a graveyard had separate rights of action in respect of disturbance of graves therein by one common act. Those remarks exactly apply to this case. The rule as it now stands was intended to have a wider application than the old one: *Drincqbier* v. *Wood* (4), where the common ground of relief was the issue of a misleading prospectus, and joinder was allowed; so too in *Universities of Oxford and Cambridge* v. *Gill & Sons*. (5) The difference between the rights of the "casual cart stands" and "yearly cart stands" is so trifling that it would be most inconvenient to compel a separate action to be brought in respect of each right. The claim made is in respect of rights given by an Act of Parliament, under which the plaintiffs have certain proprietary rights: it is in fact in respect of the "same transaction," and the statement of claim is rightly framed. The action is in respect of a common right claimed by all the plaintiffs, which they say it is the common practice of the defendant to disregard.

Levett, Q.C., in reply. There is no connection between the "transaction" or "series of transactions" here except the

(1) [1893] 2 Q. B. 412; S.C. [1894] A. C. 494.
(2) [1898] 2 Q. B. 44.
(3) [1898] 2 Q. B. 53.
(4) Ante, p. 393.
(5) Ante, p. 55.

Act of Parliament: that is not a "transaction." The growers as a class cannot be said to have any common proprietary right, and Order XVI., r. 9, applies only to persons who have or claim some proprietary right: *Temperton* v. *Russell*. (1) The claim is of a right in the nature of a public right, and the proper way of raising this question is to make the Attorney-General a party. The plaintiffs have joined six separate actions for extortion in one action; this cannot be allowed.

Cur. adv. vult.

1898. Dec. 7. ROMER J. This application gives rise to questions of some nicety. The first point I have to consider is, whether the plaintiffs are entitled to sue on behalf of themselves and all other growers of fruit, flowers, vegetables, roots or herbs within the meaning of the Act of 9 Geo. 4, c. cxiii. Now, as was pointed out in *Temperton* v. *Russell* (1), Order XVI., r. 9, which provides for persons suing or being sued as representing a class, only extends to cases in which the class have or claim some beneficial proprietary right which is being asserted or defended. I have, therefore, to consider whether the growers in question as a class have or claim a beneficial proprietary right under the above Act which is being asserted in this action. On consideration of the provisions of that Act in favour of the growers with regard to Covent Garden Market, I am unable to come to the conclusion that the growers, as a class, have any proprietary rights in respect of the market. All members of the public have a right to go to and use the market, and it appears to me that by the Act all that is in substance provided is, that those members of the public coming to use the market who are growers shall have preference over the rest of the public in using and having let to them certain parts of the market. Of course, if any individual grower had let to him under the Act a part of the market, he would, during the letting and in respect of the part let, have a proprietary right. But I cannot see that the growers as a class can be said to have a proprietary right in respect of the market merely because, if any member of the class chooses to go to and use

(1) [1893] 1 Q. B. 435.

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the market, he can claim to be preferred over what I may call an outside member of the public in using or having let to him a portion of certain specified parts of the market. If I held the opposite view, I do not see how I could avoid also holding that the public as a class had a proprietary right in respect of the market, because, as against the owner of the market, it had a right of access to and user of the market. It appears to me that such right as the growers as a class have under the Act is in the nature of a public right, which must be enforced, when necessary, by the Attorney-General. Of course, any member of the class who has been injured by the provisions of the Act being disregarded will have his remedy in respect of his own individual injury. But when the complaint is that the rights of the growers as a class have been disregarded, and relief is sought on behalf of the class by way of declaration of right or injunction, then I think the Attorney-General is the proper person to sue.

It was suggested that questions under the Act might arise between the growers as a class and the rest of the public, and that the Attorney-General must then represent the general public. But, in a case of that kind, the difficulty could be met by the Attorney-General, on behalf of the Crown, representing the one section of the public, and the Solicitor-General representing the other section. A similar difficulty in other cases has in this way been got over.

The views above expressed dispose of the plaintiffs' case, so far as it seeks relief on behalf of the growers as a class. But I have still to consider the several claims of the six plaintiffs as individuals. Each of those claims is perfectly distinct from the others, and depends for its determination upon its own facts, and constitutes in substance a separate action as against the defendant. The question whether these six separate claims are rightly joined depends upon Order XVI., r. 1. On consideration it appears to me that the six plaintiffs, so far as their individual claims are concerned, have not, and do not claim, any right to relief "in respect of or arising out of the same transaction or series of transactions" within the meaning of those words as used in the above rule. The right to relief

of each plaintiff depends upon the transactions peculiar to himself under which it is alleged he has been specially injured as an individual. These transactions are not the same as those on which the other plaintiffs have to rely in support of their special injuries, and of their special claims in respect of those injuries. And the transactions on which the plaintiffs have respectively to rely to support their claims are not made one merely because the defendant is alleged to have made a practice of disregarding the rights of growers. For these reasons it appears to me that the six several claims of the plaintiffs as individuals are not rightly joined in one action. I think, therefore, that the further prosecution of this action as at present constituted ought not to be allowed. But, in order to save unnecessary expense, I will give the plaintiffs liberty to elect, if they can agree between themselves to do so, to continue the action on behalf of any one of the plaintiffs, so far only as he seeks relief as an individual, and, to enable that to be done, I give liberty to amend the writ and the statement of claim. The election and amendment must be made within fourteen days from the drawing up of this order. The plaintiffs must pay the costs of the defendant incurred in the action up to the present time, including the costs of this application. If no election and amendment be made under the liberty above given, then the statement of claim will be struck out, and all further proceedings in the action will be stayed.

W. C. D.

C. A.

The plaintiffs appealed. The appeal came on for hearing on February 11, 1899.

Farwell, Q.C., and *J. T. Prior*, for the plaintiffs. The learned judge held that the plaintiffs could not sue in a representative capacity, under Order XVI., r. 9, on the ground that the growers as a class had not any beneficial proprietary right in respect of the market, and he therefore thought that the case fell within the principle of *Temperton* v. *Russell*. (1) It is submitted that the growers have a proprietary right in respect

(1) [1893] 1 Q. B. 435.

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of the statutory letting of the cart stands: see *Ellis* v. *Bridgnorth Corporation* (1), and that this right will support an action of trespass: *Holford* v. *Bailey*. (2) The growers claim certain preferential rights under the Act, and the Duke denies those rights altogether. As a class they have rights which they can put in litigation against the Duke, and there must be some means by which they can enforce their rights. We say, first, that one member of the class is entitled to sue on behalf of the class; and, secondly, that the plaintiffs are entitled to unite their claims in one action under Order XVI., r. 1. With regard to the first point, it is settled that a freehold tenant of a manor may sue on behalf of all in respect of all commonable rights, although he may not himself have suffered an infringement of all the rights: *Warrick* v. *Queen's College, Oxford* (3); so a parishioner may sue on behalf of all parishioners in respect of a right belonging to the class. The growers are a fluctuating class of the public created by the Act, and a representative action is the proper mode of asserting the special rights conferred upon them by the Act. Then as to the second point: the growers as a class claim to have three sets of rights under one Act, and all the rights are infringed as against all the growers. The right to relief arises out of the same transaction or series of transactions, namely, the persistent refusal by the Duke of their several rights. The plaintiffs are, therefore, within the rule: see *Stroud* v. *Lawson* (4), per Chitty L.J.; *Universities of Oxford and Cambridge* v. *Gill & Sons* (5); *Drincqbier* v. *Wood*. (6) With regard to making the Attorney-General a party, he cannot represent the growers, because, although a section of the public, they are asserting certain preferential rights conferred on them by the Act against the general public. It may be that the general public have rights in respect of the market which ought to be protected by the Attorney-General, in which case he might be made a defendant. The cases in which the Attorney-General can sue are set out in Daniell's Chancery Practice, 5th ed. vol. i. p. 8. There is no case there

(1) (1863) 15 C. B. (N.S.) 52.
(2) (1849) 13 Q. B. 426, 446.
(3) (1871) L. R. 6 Ch. 716.
(4) [1898] 2 Q. B. 44, 52.
(5) Ante, p. 55.
(6) Ante, p. 393.

mentioned in the least resembling this; and see Mitford's Pleadings in Chancery, 5th ed. p. 7; *Attorney-General* v. *Brown*. (1) If the Court sees that the plaintiffs have some rights under the Act it will not be careful to define them at this stage of the proceedings.

Levett, *Q.C.*, *Danckwerts*, and *Gwynne James*, for the defendant. (1.) The plaintiffs are not entitled to sue as representing the class of growers. No such form of action was ever allowed at common law. In equity the practice of representative suits arose from the idea that a suit was not perfect unless every person who had an interest in the subject-matter was a party to it, and, when those persons were so numerous that they could not all conveniently be made parties, some of them were allowed to sue as representing the whole body: Daniell's Chancery Practice, 6th ed. p. 194. But, in order that such a suit should be maintained, there must be no actual or possible conflict of interest between the different members of the class represented. This is illustrated by the ordinary case of a suit by a shareholder on behalf of himself and others to restrain ultra vires acts by the company and the directors. There the suit is on behalf of the plaintiff and all the other shareholders, except those who are made defendants. In *Jones* v. *Garcia del Rio* (2) the plaintiffs, being three of the subscribers to the Peruvian loan, filed a bill on behalf of themselves and all other the subscribers to that loan to have the subscription moneys returned. Lord Eldon held that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity, and that they could not file a bill on behalf of themselves and the other holders of scrip, for that it did not necessarily follow that every subscriber should, like the plaintiff, wish to retire from the speculation, and that every individual must judge for himself in that respect. The present action is not really representative. It may well be that there are in the country 10,000 growers of vegetables, &c., and there are only thirty-eight casual cart stands in the market. The large growers near London can get to the market earlier than those who live in the country and send their produce up to London by railway.

(1) (1818) 1 Swans. 265. (2) (1823) T. & R. 297.

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A small grower might not even possess a cart. The action is really brought for the benefit of the large growers near London as against all the other growers in the country. This observation applies equally to the yearly cart stands and the yearly pitching stands. In substance the plaintiffs are not entitled to maintain a representative action. They do not and cannot shew that they have a common proprietary right.

[LINDLEY M.R. Why cannot the two classes of growers unite against the common enemy, i.e., those persons who are not entitled to preferential rights in the market?]

There is no common enemy. The plaintiffs allege only three instances of persons having been in fact refused stalls. In an action by a shareholder to restrain ultra vires acts, any shareholder who objects to the action may be made a defendant. Are all the growers in the United Kingdom to be searched for and made defendants here? The growers have different rights inter se, and they have no common enemy; the Duke is not an enemy to the small growers. The lord of a market is bound to give the public something in return for the privilege conferred on him by the Crown. The market must be open to all Her Majesty's subjects. But that is not a proprietary right. It resembles the right of the public to walk along a highway.

[RIGBY L.J. Is there not a right of access to a highway? See *Lyon* v. *Fishmongers' Co.* (1)]

That would not be a proprietary right, but a right of access as one of the public. In *Weale* v. *West Middlesex Waterworks Co.* (2) the question was whether the Court could compel a water company, on the payment of reasonable charges, to supply water to an inhabitant of a district assigned to the company by statute, and it was held that the Court ought not to interfere by injunction. Lord Eldon also said (3) that the plaintiff could not maintain a suit on behalf of himself and the other inhabitants of the district, and (4) that if a person was refused at a fair or market the accommodation to which he was by law entitled, a Court of Equity could not interfere by injunction. Before the Act of 1828 there had been litigation about Covent

(1) (1876) 1 App. Cas. 662.
(2) (1820) 1 Jac. & W. 358.
(3) 1 Jac. & W. 369.
(4) Ibid. 373.

Garden Market. In *Prince* v. *Lewis* (1) it was held that the Duke was not bound to appropriate any particular part of the area of the market to the purposes of the market, though he could not recover tolls from persons who sold vegetables, &c., in an adjoining street, if he did not leave sufficient space in the area of the market. The rights of the lord of a market are illustrated by *Mosley* v. *Walker* (2) and *In re Islington Market Bill.* (3) The Act does not confer on the growers any proprietary right, and, unless they have or claim such a right, rule 9 of Order XVI. does not authorize some of them to sue on behalf of all: *Temperton* v. *Russell.* (4) There is nothing in the Act to give the growers any right which they had not before it was passed. Sect. 17 is the only section which confers a preferential right. That simply gives a grower the right to turn out any non-grower from that part of the market in which growers have a preference. If the Duke is violating any provision of the Act the Attorney-General should sue on behalf of the class which is thereby injured, or each individual who is injured can bring his own action. Non-growers are a class equally with growers. The public have rights in the market. With regard to the "yearly cart stands," no one who has not obtained a lease has any preferential right, or any right at all. How can the plaintiffs represent the growers with reference to these stands? As to the "yearly pitching stands," the Duke is empowered by the Act to grant leases which he could not otherwise have granted, but there is no obligation to grant any lease at all. Non-growers have as good right as growers, subject to the preference. It is only a qualified public right.

(2.) Then, if the plaintiffs cannot sue as representing the class of growers, can they join their distinct individual causes of action in one action? Rule 1 of Order XVI. does not authorise their doing so. There would not be any common question of law or fact, and the causes of action would not arise out of the same transaction or series of transactions: *Stroud* v. *Lawson.* (5)

(1) (1826) 5 B. & C. 363.
(2) (1827) 7 B. & C. 40.
(3) (1835) 3 Cl. & F. 513.
(4) [1893] 1 Q. B. 435.
(5) [1898] 2 Q. B. 44.

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[The arguments on this point are not more fully reported because the decision of the Court turned upon the other point.]

The Court has an inherent jurisdiction to put an end to an action which is not authorized by the rules: *Smurthwaite* v. *Hannay*. (1)

The grievance alleged (if there be any grievance at all) is a breach of a statutory duty. The right conferred is a public right, and the Attorney-General alone is entitled to enforce its performance: *Attorney-General* v. *London and North Western Ry. Co.* (2); *Ware* v. *Regent's Canal Company* (3); *Attorney-General* v. *Great Northern Ry. Co.* (4); *Iveson* v. *Moore* (5); *Pain* v. *Patrick* (6); *Attorney-General* v. *Great Eastern Ry. Co.* (7) The plaintiffs ought to have sued (as relators) in the name of the Attorney-General. In *Ellis* v. *Bridgnorth Corporation* (8) and *Wood* v. *McCarthy* (9) the plaintiffs had a proprietary right. The Act of 1828 does not confer any beneficial proprietary right on the growers; the word "appropriate" only authorizes an appropriation for the purposes of the better management of the market.

Farwell, Q.C., in reply. If the Attorney-General can sue, it does not follow that no one else can; any individual who has suffered injury by an infringement of a public right can also sue in respect of that injury. Of course, the individual must shew special damage. In *Stroud* v. *Lawson* (10) there were two entirely distinct rights; that is not so here. The present case is like that of a number of persons who were injured by the same railway accident to the same train. Here the Court is asked to declare the rights of a class and to enforce them by injunction. When a right is denied the Court will interfere by injunction, even though no damage is proved. *Warrick* v. *Queen's College, Oxford* (11), authorizes the present action on behalf of a class. A single shareholder in a company can

(1) [1894] A. C. 494.
(2) [1899] 1 Q. B. 72, 75.
(3) (1858) 5 Jur. (N.S.) 25.
(4) (1860) 1 Dr. & Sm. 154.
(5) (1697) 1 Salk. 15; 1 Ld. Raym. 486.
(6) (1690) 3 Mod. 289.
(7) (1879) 11 Ch. D. 449.
(8) 15 C. B. (N.S.) 76.
(9) [1893] 1 Q. B. 775.
(10) [1898] 2 Q. B. 44.
(11) L. R. 6 Ch. 716, 726.

sue to restrain ultra vires acts of the company and their directors, even though all the other shareholders approve of those acts.

Temperton v. *Russell* (1) is distinguishable. It was really only a decision that rule 9 of Order XVI. does not apply to actions founded on tort.

The plaintiffs and those whom they represent must have a common interest, and that is so here.

Cur. adv. vult.

Feb. 14. LINDLEY M.R., after reading the summons and the order of Romer J., continued:—The decision of Romer J. was in substance in accordance with the summons, and it is plain from his judgment that he made the order on the following ground. He said, "I am unable to come to the conclusion that the growers as a class have any proprietary rights in respect of the market." Now, although the question is of the nature I have just mentioned, it raises an important point of principle, namely, whether it is possible to maintain such an action as this. Romer J. held that it is not. He said that the action was wrongly conceived, and that the only remedy (if any) open to the plaintiffs is, that each of them must sue for his own grievance, or the Attorney-General must sue on behalf of the public. [His Lordship referred to the statement of claim, and continued:—]

The grievance alleged by the plaintiffs is this. They say that the growers of fruit, &c., have certain preferential rights in respect of certain stands in the market which are referred to in the Act as the "casual cart stands," the "yearly cart stands," and the "yearly pitching stands," and their contention is that under the Act the growers of fruit and vegetables have not merely as any one of the public an ordinary right to resort to the market and to have their waggons standing there, but that they have, as a section of the public, certain preferential rights available against the rest of the public, which must be respected by the defendant, who is the lord of the market.

(1) [1893] 1 Q. B. 435.

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Now, if that is true, I cannot see why some of the growers should not be at liberty to bring the question whether they have or not this preferential right to a test in an action, framed as this is, by some of them on behalf of themselves and the other growers. I do not intend now to spell through the Act in order to ascertain exactly what are the rights (if any) of the growers in respect of these three classes of stands. I have looked through the Act very carefully, and I have studied it section by section, and if I could come to the conclusion that the action was frivolous—that the growers had not any rights at all, either as against the public or as against the lord of the market—it would follow that the action was altogether misconceived, and in that case perhaps the sooner it was stopped the better. But I cannot come to the conclusion that there is nothing honestly to try in respect of the controversy which the plaintiffs set up. Take, for example, the "casual cart stands." I differ from Romer J. in that I have come to the conclusion that there is an honest question to be tried, which can be tried in an action by some of the growers on behalf of themselves and the others. I will say no more at present. The question who the "growers" are may be a serious one, because, at the time when this Act was passed, as we all know, London was supplied with vegetables very differently from the way in which it is now supplied. In the year 1828, which was before railways, or indeed steamboats, carried cargoes to any great extent, London was supplied by the market gardeners round London and depended upon them for its supply, and the growers who actually fed London were the market gardeners of the neighbourhood. Now the growers who supply London do not live only in its neighbourhood. Growers send fruit and vegetables to London from Cornwall, from Scotland, from Ireland, from California, and from Africa. What the term "growers" in the Act means now I do not pretend to say. I find the expression "growers" in the Act, and I see reason for contending (I am not deciding it now) that the growers have certain rights as regards these stands in addition to and adverse to the rights of the rest of the public, and enforceable against the Duke as lord of the market. Next take the "casual

cart stands." [His Lordship referred to ss. 7 and 17 of the Act, and continued:—]

Now observe how impossible it would be for an action by a single grower to succeed, either at law or in equity, unless he could prove some definite grievance of his own. He might be at once checkmated by the lord of the market saying, "You as one individual have no right; I will give your stand to some one else." The lord could play one grower off against the others, and so defeat each of them in turn, and yet he might (as the plaintiffs say he does) deny that the growers have any preferential rights at all. How is the question whether they have preferential rights to be ascertained according to the ordinary rules of procedure? It cannot be properly or adequately done in an action in which one grower is plaintiff. Besides, an action by one would not bind the others in any shape or sense. I do not think it could be done in an information or action by the Attorney-General, unless he made some of the growers parties on behalf of themselves and the others, and for this reason, that the claim of the growers is against the public as well as against the lord—that they, as a special portion of the public, and having preferential rights under the Act, are met by a denial of all preferential rights. It would be extremely difficult for any one grower to shew that he in particular had a right as distinguished from the others. So again, as regards the "yearly cart stands," the right which the plaintiffs allege is that they as growers have preferential rights to leases on the terms mentioned in the Act. I doubt very much whether any one of them could maintain an action of specific performance for the grant of a lease. They would be all beaten in detail. There again, the Attorney-General would not represent the growers. He would represent the public as against the growers; and I do not think he could adequately represent the rights which are asserted by the growers. The grievance alleged is, not that A. or B. or C., being a grower, cannot get a yearly cart stand, but that the Duke (no doubt from his point of view for the better regulation of the market) says, "You have no right there at all," and has set them all at defiance. Similar observations apply to the "yearly pitching stands," as to which no

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doubt there is a greater difficulty as to the right to any relief. But even there some preferential rights are apparently given to growers, though what they are is a matter which will have to be ascertained when the action is tried.

Take any one of these cases dissociated from the others. Would it not be right to have the question whether the preferential rights asserted exist or not tried in an action brought by some of the growers on behalf of themselves and the others? I cannot conceive any reason why it should not. The growers, who are a statutory indefinite class (whether large or small I do not know), are a class on which the statute has conferred certain preferential rights. There is, according to the allegations in the statement of claim, a common right, a common interest, for it is alleged that the Duke ignores the rights of the whole class.

Now let us go back to the time before the Judicature Act, when I was myself an equity draftsman, and understood something about suits by some plaintiffs on behalf of themselves and others. I cannot conceive any reason why such a suit as this should not have been maintained then. Mr. Levett has referred to one or two cases which, he thinks, shew the contrary. The only one which seems to me of the slightest importance is *Weale* v. *West Middlesex Waterworks Co.* (1) The decision of Lord Eldon in that case I should have thought was extremely easy. In the first place, the bill was not by one plaintiff on behalf of himself and others. That form of suit was carefully avoided, and the real object of the suit was to compel the Court of Chancery to settle the price to be paid to the company for water. The judgment of Lord Eldon is an extremely instructive one. He refers to various cases in which a bill by one plaintiff on behalf of himself and others would not lie, and the most important of them is that on which Mr. Levett relied. My answer to that case is that we have advanced a long way since Lord Eldon's time in suits of this description, and in recent times suits by one plaintiff on behalf of himself and others have been maintained, which perhaps Lord Eldon would not have sanctioned. Moreover now, under the Judi-

(1) 1 Jac. & W. 358.

cature Act, actions can be brought merely to declare rights, and this is an innovation of a very important kind. I am referring to Order xxv., r. 5, which says: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." Having regard to that rule, it appears to me impossible now to say that one grower could not maintain such an action as this, on behalf of himself and all other the growers of fruit and vegetables, to assert the preferential rights to which, he says, the whole class of growers are entitled.

Mr. Levett referred to another decision of Lord Eldon—*Jones* v. *Garcia del Rio* (1)—which was to the effect that persons who had lost their money in subscribing to the Peruvian loan could not sue on behalf of themselves and the other subscribers to have their subscriptions returned. But that decision has been reconsidered, and has been to a certain extent modified in modern times, and there is an authority on the point in *Beeching* v. *Lloyd* (2), the head-note of which is: "Bill by two of the intended shareholders of a projected company, on behalf of themselves and all other depositors, for return of the deposits paid by the two plaintiffs. The bill alleged gross fraud in concocting the company and obtaining the deposits. A demurrer for want of equity, and on the ground that no two depositors could sue together for the mere return of deposits, was overruled." Whether that is or is not an advance on Lord Eldon's doctrine I am not sure. The circumstances were different, because there the ground alleged for rescission of the contract was a fraudulent prospectus. I understand that case as warranting an action by one plaintiff, on behalf of himself and others who had been defrauded by the prospectus, to get their money returned. Now, the principle on which the old Courts of Equity allowed suits by some plaintiffs on behalf of themselves and others was much discussed in *Warrick* v. *Queen's College, Oxford* (3), in which a most instructive judgment on this particular point was delivered by Lord Hatherley.

(1) T. & R. 297. (2) (1855) 3 Drew. 227. (3) L. R. 6 Ch. 716.

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That bill was filed by four freehold tenants of a manor, on behalf of themselves and all the other tenants, against the lords, claiming various rights of common. There was a great deal of litigation about the frame of the suit, and Lord Hatherley held that a bill in that form would lie, although, broadly speaking, if you went back to antiquity, each freeholder would be suing on his separate prescriptive right. But Lord Hatherley held that they had a sufficient common interest in disputing the rights of the lords over the common, and overruled the objection. And at p. 726 he appears to me to have stated the real doctrine as it was then understood and applied. He said: "It may be, of course, that the tenants had separate grants, and that a particular house was free from some claim or demand on the part of the lord from which others were not free; for instance, from quit-rent, or something of that kind. But that would not at all prevent their having certain large privileges in common with others. I take it that the view of this Court is, that all persons having a common right, which is invaded by a common enemy, although they may have different rights inter se, are entitled to join in attacking that common enemy in respect of that common right." Then he gave an instance in modern times of shareholders in a railway company.

Now, if the allegations in the statement of claim in the present case are true (of which I know nothing), the case is in my opinion brought within the principle thus laid down by Lord Hatherley.

Warrick v. *Queen's College, Oxford* (1), is, I think, an authority to shew what, apart from it, I should have thought from my own training, that there would be no difficulty in maintaining an action by some of the growers on behalf of themselves and the others to vindicate their rights against what I will call the common enemy—a person who says that the class have no rights at all. I do not mean to say that this action is properly constituted; I do not think it is. I have already expressed my opinion that these plaintiffs are asserting as against the public rights which the Attorney-General ought to be here to protect. That difficulty, however, can be got over in a way

(1) L. R. 6 Ch. 716.

which I will mention presently. I am now addressing my mind to the view of Romer J., who says that, even if the growers have these rights, the plaintiffs cannot sue on behalf of themselves and others, but each of them must sue alone, or the Attorney-General must sue on their behalf. From that I respectfully differ. This applies not only to the casual cart stands, but also to the yearly cart stands and the yearly pitching stands. In my judgment one grower could sue, on behalf of himself and others, in an action addressed to each of those stands.

I now pass to the question whether they can combine the three causes of action in one. That to my mind is a pure question of convenience. The rights of the class of growers depends on the construction of (I may say) the same sections of the Act. That is not literally true; but the question turns, not only on the construction of the Act as a whole, but on ss. 7 and 17 as modified by the rest. The right which the plaintiffs claim is a statutory right of preference available over three classes of stands, and if, as they say, all the preferential rights are ignored, I cannot see why the question should not be raised in one action, instead of three. If the learned judge had thought it was inconvenient to mix up one class of stands with the others, and had said so, I do not suppose we should have interfered with his discretion. But there is nothing which I know of in law, and nothing in this present case of convenience, which would be gained by compelling the plaintiffs to bring three actions, one confined to the casual cart stands, one confined to the yearly cart stands, and one confined to the yearly pitching stands. It appears to me to be eminently a case in which, having regard to the scope of the Act, one action properly constituted may be maintained in respect of all the three classes of stands.

Another objection is taken, that, even if that be so, the plaintiffs cannot sue for the return of the overpayments which they allege they have made. I do not think that is a material objection. It would not warrant us in setting aside the writ and all the proceedings under it. It might be ground for an amendment of the pleadings or a dismissal of so much of the

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action as related to that matter; but I do not go into that. Looking at the question as a mere matter of procedure, I doubt whether after *Beeching* v. *Lloyd* (1) there is anything so radically wrong in the action that the writ ought to be struck out. As to whether the action will ultimately succeed I do not say anything, but in my opinion it ought not to be summarily dismissed.

I have given my reasons for thinking that an action by the Attorney-General, in the absence of some one representing the growers, would not be a proper form in which to raise the controversy which the growers wish to raise. The Attorney-General would properly represent the public, including the growers, but upon a question between the growers and the rest of the public I do not think he could represent the growers. Romer J. felt that difficulty, and said that it could be got over by having the Attorney-General to represent one class of the public and the Solicitor-General to represent the other class, or vice versâ. I do not say this could not be done in that way, but I doubt it, and I have never heard of such a proceeding. In my view the proper mode of dealing with the difficulty is to make the Attorney-General a defendant, to represent the public as against the alleged preferential rights of the growers, who claim rights separate and distinct from those of the public in general.

What then is to be done? In my opinion the appeal must be allowed and the order below discharged, and, upon the plaintiffs by their counsel undertaking to amend the writ and pleadings, and to make the Attorney-General a defendant, leave to amend will be given, and the plaintiffs' costs, both here and in the Court below, must be their costs in the action. I think that will meet the justice of the case. I am satisfied that there is a serious question to be tried. We cannot try it now, partly because the Attorney-General is not here, and partly because we have not the materials on which to decide it.

RIGBY L.J. The six plaintiffs, all claiming to be "growers" within the meaning of the Act of 1828, sue on behalf of them-

(1) 3 Drew. 227.

selves and the other growers, the sole defendant being the Duke of Bedford, who is the lord of Covent Garden Market. The object of the action, as I understand it, is to have discussed and determined the question whether any and what preferential rights are given to the class which the six plaintiffs claim to represent under and by virtue of the Act.

I propose to avoid saying anything upon the construction of the Act beyond this, that I have examined the Act sufficiently to satisfy myself that there are questions which ought to be determined, and that the action, therefore, cannot be looked upon as frivolous and vexatious, or as an abuse of the process of the Court, or in any light which could authorize the Court summarily to put an end to it. I think, therefore, that the action ought to go on; and it appears to me that the class of growers created by the Act must be regarded as a class which, as against the rest of the public, may have preferential rights under the Act. All questions upon the construction of the Act remain open, and, though I have formed some opinion about it, I do not propose now to indicate what it is. It would be wrong to do so for this (if for no other) reason, that the public are important parties to the discussion, and they are not now represented at all. These alleged preferential rights could not, in my opinion, be set up without the presence of the Attorney-General. The Duke of Bedford, the only defendant, does not represent the public, and, as the action is now constituted, no one represents the public. Therefore it would be wrong (and on other grounds it would be inadvisable) to determine the important questions on the construction of the Act, at any rate as against the public, in the absence of the Attorney-General, who would represent them.

The six plaintiffs do not claim to represent different classes of growers. They claim to represent the whole class of growers, and on behalf of that class they point to the Act and claim certain privileges. The Act does not split up the class of growers; it nowhere (so far as I can see) speaks of this class of growers and that class of growers, but it gives privileges to the whole class, and I cannot see why this action is not a good way, even if it is not the best way, of raising the question.

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The only other way, as it seems to me, in which the question could be raised would be by an information by the Attorney-General against the growers, and then the growers would have to be represented as defendants. What advantage there would be in that I do not see. The Attorney-General would represent the public at large, and he could not, as against them, represent any growers. If this question is not an improper one to be tried, it ought, I think, to be tried in this action. I agree with the Master of the Rolls that this doctrine of representative actions has been a progressive and growing one—fortunately, I think—since the time of Lord Eldon, and I do not think it necessary to go into cases. I will however say this—that I do not know of any case in which a bonâ fide claim on behalf of a class has been summarily disposed of by saying that some members of the class did not represent the whole. Here we have no difficulty such as might arise if we were construing a grant from the lord of the market. It might be that a grant in favour of persons improperly described or not sufficiently ascertained would be on the face of it void. We are dealing with an Act of Parliament which creates or sufficiently indicates a class of persons to whom, it is not unreasonably suggested, the Act gives preferential rights.

That being my view of the case, there would be no use that I can see in splitting up the claims of the plaintiffs, because one relates to one part of the market and one to another. The plaintiffs represent the whole class, and, representing the whole class, they say, "We wish to have our rights ascertained and declared," and then some consequential relief is sought. The main object—the substance—of the suit is that they wish to have the rights of the growers under the Act declared. I do not think that Romer J., if he had allowed that they could act representatively, would have said that the rights must be split up into different questions. What he decided is that this is not a case in which a representative action will lie at all. Therefore the plaintiffs must be treated as individuals, some coming under one allegation and some under another, and, as he would not allow a representative action, he treated the plaintiffs as split up in that way, and asked whether they

could join their causes of action. But that is not the case. The plaintiffs are seeking to act as representatives of the whole class of growers, and I cannot doubt that the convenient and proper course, when they raise one question about the class, is to raise them all, and put their claims on any ground which they think they can under the provisions of the Act maintain.

I do not think that any question under rule 1 of Order XVI. arises. The action is for one main purpose, namely to ascertain the rights of the growers under the Act, and there is no question whether advantage can be taken of the provision of the rule which in certain cases permits different plaintiffs having separate causes of action to have those causes of action tried together in one action. That is not the present case. In my opinion this is a proper case for a representative action by one or more of the growers. Here there are six plaintiffs. There is no harm in having six—there is a better security for costs. But, according to my view, one plaintiff might have raised the whole question. I think it would be wrong to prevent the question from being raised in this way, and in fact it appears to me that it could not be effectively raised in any other way.

VAUGHAN WILLIAMS L.J. I have arrived at a different conclusion. I think the judgment of Romer J. was perfectly right.

I am somewhat embarrassed by the consideration that the judgment of the Court is that this question, which really arises on the construction of the Act, must be tried hereafter. That being so, it is obviously undesirable that I should now put a construction upon the Act. But, on the other hand, it is not easy to avoid doing so to a certain extent, because, in my judgment, the ground upon which this action ought to be dealt with (as Romer J. did deal with it) is, that, according to the true construction of the Act, the action is altogether wrongly constituted. And that being really, in my view, the only question which will have to be tried, it is very unfortunate that it cannot be disposed of now, and an expensive litigation got rid of. When the action does come to trial, if the view which

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was taken by Romer J., and which I am now taking, is right, there will be an end of the action; and it seems to me that it would be much more convenient if the question could be solved now once for all, whether these plaintiffs can or cannot properly bring an action in respect of the matters of which they are complaining.

In my view the decision of Romer J. (apart from Order XVI., r. 1, which I agree is quite a subsidiary question) is based upon this, that the plaintiffs cannot bring a representative action because they are not members of a class having a common right. They are of course not members of such a class if, according to the true construction of the Act, it provides for the regulation of the market, and confers no private rights whatever, but only affects public rights—rights in respect of which, by an old and well-established series of decisions, no member of the public can bring an action, unless he is able to allege a particular injury to himself, as distinguished from the other subjects of Her Majesty, and bases his claim on the damage caused to him by that particular injury. As I have already said, it is extremely difficult to give the reasons for my decision without to a certain extent expressing my view of the meaning of the Act. On the other hand, I do not think it is necessary for me to go through the Act section by section to see whether one particular section, or the whole of the sections after they have been separately carefully examined, were intended to create private rights. It will be sufficient for me to state my view generally. I think perhaps the best way in which I can do this is to state what I understand to be the argument put forward on behalf of the defendant, and, having made that clear, to say that in my judgment that argument raises such a primâ facie case that we ought to dispose of it at once, and say whether the action is or is not so improperly constituted that it ought not to be allowed to proceed.

But I wish first to make two observations, which do not turn on any controversy upon the construction of the Act. The first is this (and here I am glad to find that I am in accord with the other members of the Court), that the questions raised in the action are so much questions of public right that it is impossible

that the action should proceed without the presence of the Attorney-General either as plaintiff or defendant. Speaking for myself, I have been unable to find, either at common law or in equity, a single instance in which an individual member of the public has been allowed to bring an action in respect of a matter which is so much a matter of public right that it cannot be disposed of without the presence of the Attorney-General, unless the plaintiff has alleged particular damage to himself. I desire to make a further observation with regard to a matter as to which I should have the greatest possible hesitation in differing from the opinion of the Master of the Rolls and Rigby L.J., because it would be affectation on my part not to avow that on such a subject their judgments must be much better than mine. Their decision is to a certain extent based upon the equity practice of allowing one person to bring an action on behalf of himself and others, and they consider that the present case falls within the principles which have governed that practice. If this question were merely what are those principles, I should not presume to differ from their conclusion. But I do not think I am differing from them as to the principles; I have only arrived at a different conclusion of fact. I have looked at *Beeching* v. *Lloyd* (1) and *Warrick* v. *Queen's College, Oxford* (2), and it seems to me that these cases entirely coincide with what I am about to say, as well as with what has been said by my brethren. The principle laid down by those cases is, that one plaintiff may bring an action on behalf of himself and others when there is a community of interest. But I do not understand either of those cases as deciding that one may bring an action on behalf of himself and others when there is not some one interest in which they all have a common concern. In my view that is not true in the present case, because all the plaintiffs here are suing in respect of a private right, and, inasmuch as they have not individually a private right irrespective of particular damage, à fortiori they cannot have a community of interest in some one private right.

I will only say a few words as to the defendant's argument. I have come to the conclusion, not that that argument

(1) 3 Drew. 227. (2) L. R. 6 Ch. 716.

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has been established, for, if it were, there would be an end of the action, and the Court has decided that the action is to proceed; but in my opinion that argument does establish such a primâ facie proof of its truth that we ought now to go on and decide, one way or the other, upon the contentions raised thereby, so that, in case the argument of the defendant is established, there may be an end of this litigation, though not of course an end of the rights of the plaintiffs in so far as they are interested in the public right. As regards the public right, they can get the Attorney-General to bring an action—an action which will be much more convenient for the trial of these questions than the present action, because in it the non-growers (and I do not understand that even the plaintiffs suggest that the non-growers can be treated as a class distinct from the public) will be represented, as certainly they are not in this action as it is now constituted. Moreover, if any individual member of the public, whether a grower or not, has sustained a particular injury, he can obtain no relief in this action.

Now I understand the contention of the defendant to be this. It is said by him that the plaintiffs cannot avail themselves of Order XVI., r. 9, because they have not the same interest in any cause or matter. The interest alleged by the plaintiffs arises under "An Act for the Improvement and Regulation of Covent Garden Market." That is the title of the Act. The plaintiffs allege that that Act gives the growers as a class certain preferential rights, constituting some sort of proprietary interest in them. They make no claim except under the Act. The defendant contends that this Act deals with public rights only, and creates no private rights whatever, and no rights in any section of the public, and that it derogates in no way from his rights as they existed before the Act. The market, it is said, is a franchise, and could only be granted by the Crown for the public good, and the public must have free access to it, subject only to reasonable tolls and to certain rights of stallage, &c., which must not interfere with the enjoyment of the market; that order must be maintained in the market; that it is the duty and the right of the lord to regulate

the market, but that, as questions had arisen as to the sufficiency of his power to regulate the market, this Act was passed for its regulation; that the growers and non-growers had each of them places assigned in the market, and that the growers had appropriated to them, or rather to their purposes, certain spaces in preference to non-growers, and that this is merely a regulation of the market, and confers on the growers no right of property whatever, and that to say it does would be equivalent to saying that an enactment or a by-law which provided that in the occupation of seats the rule seniores priores should apply would create a right of property in the seniors. It is further pointed out that this Act is not like one embodying a compact between persons or corporations capable of contracting; that the growers as such are not a sufficiently definite body to make a contract; that any member of the public may become a grower, and as a member of the public may enjoy, not only access to the market, but the particular access accorded by the Act to growers. I do not propose to say how far the different sections of the Act support the argument which I have endeavoured to summarise. But in my judgment that argument is of such a character as to entitle the defendant to have it decided now whether this action is properly constituted, or whether it ought not at once to be stayed for its obvious defects.

LINDLEY M.R. The appeal will be allowed, and the order of the Court below discharged. The plaintiffs must undertake to make the Attorney-General a defendant, and they will have leave to amend. The costs both here and below will be the plaintiffs' costs in the action.

Solicitors: *H. B. Bell; R. S. Taylor, Son & Humbert.*

W. L. C.

C. A.
1899
Feb. 1.

In re X. (1)
X. *v.* Y.

Infant—Guardianship—Protestant Parents—Mother surviving Sole Guardian—Remarriage of Mother—Roman Catholic Husband—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *s.* 2—*Discretion of the Court.*

Under the Guardianship of Infants Act, 1886, where there is no guardian appointed by the father in existence, the mother, if surviving the father, is entitled to be the sole guardian of an infant child of the marriage; and although the Court has power in such case, both under the Act and of its own jurisdiction, to appoint a guardian to act jointly with the mother, the fact that the mother has married a second husband of a faith different to that which she professes and in which the infant is being educated, is not of itself sufficient to justify the exercise of the power, so long as there is no personal misconduct or interference with the proper bringing up of the infant.

The Court will only interfere where it is shewn that, having regard to the real benefit of the infant, it ought to do so.

Appeal from Kekewich J. allowed.

Appeal from order of Kekewich J.

X. and his wife were both Protestants and had an infant son. X. by his will appointed his wife (during her widowhood) and his own father guardians of the infant son during his minority, providing that, on the death of either, the survivor should become the sole guardian, and giving directions (which are more fully stated in the judgment of the Master of the Rolls) that his son should go to Eton at or before the age of thirteen, and afterwards into the Guards.

X. died in 1886, and his father died in 1890.

In 1896 X.'s widow married again, and thereupon ceased to be testamentary guardian, although she remained guardian under the provisions of the Guardianship of Infants Act, 1886. Her second husband was a Roman Catholic; but she continued to be a Protestant, and the infant continued to be brought up in that religion.

The infant being now nearly thirteen years of age, upon an

(1) This case was heard in camerâ, and is reported with the authority of the Court.

application on his behalf by his paternal grandmother as his next friend, the husband of the testator's sister, who was an officer in the Guards, was appointed by Kekewich J. as guardian of the infant jointly with his mother.

From this order the mother of the infant now appealed.

Sir Edward Clarke, Q.C., *Warrington, Q.C.*, and *Howard Wright*, for the appellant. According to the law as established by the Guardianship of Infants Act, 1886, s. 2, the mother, if surviving, "shall be" the guardian of an infant either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father; and under certain circumstances the Court may, "if it thinks fit," appoint a guardian or guardians to act jointly with the mother. And the practice has since the Act been in accordance with these principles. We admit that the Court has discretionary power to appoint a guardian jointly with the mother, but we say that here no case has been made for the exercise of that discretion. This mother has been guardian for twelve years, and there is no suggestion that she has ever done anything that a good mother should not do. It is true that she has married a gentleman of the Roman Catholic faith; but she herself remains a Protestant; her son is being brought up as a Protestant: there is no intention whatever that his religion should be changed; and why should an imputation be thrown upon the mother by the appointment of any one, however eligible, to be joint guardian with her? The learned judge seems to have been influenced by the religion and political opinions of the second husband, and by authorities which only had application to the state of things existing before the Act of 1886.

[They were then stopped by the Court.]

Renshaw, Q.C., and *Vaughan Hawkins*, for the respondent, the next friend. The judge has in this case exercised a discretionary power, and the Court of Appeal will not interfere with the exercise of his discretion unless a strong case is made: *In re Kaye*. (1) The infant's father in his will marked out the

(1) (1866) L. R. 1 Ch. 387.

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career which he desired his boy to follow: Eton and the Army. And the near connection on the father's side, who has been appointed joint guardian with the mother, is an old Etonian, and an officer of rank in the Guards, whose experience and advice would be of great advantage in supervising the career which the father designed for his son. Moreover, the mother of the infant has married again to a gentleman of a different faith; and, as the infant has just attained the age when religious education is most requisite, it is no slur upon the mother to say that the association with her of a sensible male guardian of the infant's own religion is essentially for his benefit. Under the old practice the appointment of a married lady to be sole guardian was considered to be so unsupportable as to constrain the Court of Appeal to interfere with the discretion of the judge who had made the order: *In re Kaye.* (1) And where a feme sole who was guardian of an infant married, it was a matter of course to refer it to the master to approve of a guardian, not necessarily for the purpose of removing the lady from the guardianship, but for the purpose of ascertaining what ought to be done under the altered state of circumstances, which might not permit her to exercise that proper discretion which ought to be exercised for the benefit of the child: *In re Gornall* (2); *Jones* v. *Powell* (3); *Anon.* (4); *Austin* v. *Austin* (5); Simpson on Infants, ed. of 1875, pp. 120, 126, 424. These principles apply equally to a second marriage; and now, although under the Act of 1886 the mother, if surviving, is to be the guardian either alone, if no guardian has been appointed by the father, or jointly with any guardian appointed by him, the Legislature has been careful to provide that, if no guardian has been appointed by the father, or if the guardian appointed by him is dead (words which in the events which have happened apply to this case), the Court may, "if it shall think fit," appoint a guardian to act jointly with the mother. And surely the case of a boy of thirteen, whose mother has married again to a gentleman of a different

(1) L. R. 1 Ch. 387.
(2) (1839) 1 Beav. 347.
(3) (1846) 9 Beav. 345.
(4) (1837) 8 Sim. 346.
(5) (1865) 34 Beav. 257.

faith, is the very case for the exercise of the discretion possessed by the Court. The question comes back to this: What is the true construction of the Act of 1886? The guides to that are the principles and practice applied by the Court before the passing of that Act, and the result of the authorities is that the Court does not consider it for the benefit of an infant that a mother who has intermarried again with a gentleman of a different faith should be the sole guardian of that infant.

Stokes, for the trustees.

Sir Edward Clarke, Q.C., was not called upon to reply.

Lindley M.R. I do not think that the order made by Kekewich J. can stand. It is made on erroneous principles. I think that, convinced by Mr. Vaughan Hawkins' arguments on behalf of the respondents, the learned judge has attached too much importance to the old practice which was in force before 1886. The law as regards the rights of mothers as guardians has been revolutionised by the Act of 1886, and I cannot think that Kekewich J. has fully appreciated the immense alteration which has been made by that Act of Parliament.

Now in this case the father of the lad whose guardianship is in question made a will by which he appointed two gentlemen trustees, and his wife during her widowhood and his own father guardians of his infant son; and he directed that, on the death of either of them, the survivor should become and be the sole guardian. I doubt whether that amounts to an appointment of his wife, though she survived, as sole guardian after she married again. We have not had that point discussed; but my impression upon the true construction of this will is that, in the events that have happened—that is to say, when she married again—there was no longer in existence any guardian appointed by the testator. The testator in his will then goes on to state what he wishes as regards the future of his son; and he says: "In reference to the education of my son I should wish him at the age of nine—not later, earlier if possible—to go to a first-class private school (Cheam or any other the guardians may think fit); at twelve, but not later

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than thirteen years old, to go to Eton College, to Mitchell's House if possible and considered first class by guardians; or if not then in existence to any other they (the guardians) may think fit; if possible then to go to University (Oxford) but if that is found not to be practical with his going into the foot guards (Grenadier Guards if it can be arranged) it is to be dispensed with"—that is Oxford is to be dispensed with. "I consider too it is most important for him to get into the Brigade of Guards at as early an age as possible—if he cannot get a commission in the Grenadiers, I should choose next the Coldstreams, and if he cannot get a commission in them then the Scots Guards." Therefore, the father had a scheme for the education of his son which he indicates in the manner which I have read. The father having died in 1886, everything seems to have gone on without any discussion or unpleasantness until June, 1896, when his widow married again, and, as I understand, she married a gentleman who is a Roman Catholic, the father having been, and she and the son being, Protestants. Thereupon, as so often happens, unpleasantness arose, and the grandmother thought it would be for the benefit of her grandchild that somebody should be associated with the mother in the guardianship of the boy, and hence this litigation and the proceedings which we have to consider.

Now, we must look at the Act of Parliament applicable to the case. The Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), revolutionised the law and gave to a mother surviving her husband rights which were entirely new. Her legal position before the Act was, as regards the guardianship of her children, most unfortunate, cruel, and unjust. This state of things was brought to the attention of the Legislature. They saw that it should be altered, and s. 2 of the Act accordingly enacts that on the death of the father of an infant the mother, if surviving, shall be the guardian of the infant, either alone if no guardian has been appointed by the father, or jointly with any guardian appointed by the father. In the present case, in the events which happened, the mother is sole guardian, not by the appointment of her husband, but under the exigency of the statute.

Then the section goes on: "When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." That is to say, the mother is to be guardian; but, to use the language of the Act, the Court "may if it shall think fit from time to time appoint a guardian or guardians to act jointly with the mother." The question then arises, Why should the Court think fit to interfere at all without some sufficient reason? It is quite obvious that, although the surviving mother is made guardian by the Act, there is nothing in the Act (quite apart from the words I have read) to control the power of the Chancery Division over all guardians, or to take away its power to remove her or any other guardian—even the father—for misconduct which would justify such an interference with marital rights. But why should the Court interfere in this case? That is the strength of Sir Edward Clarke's argument. We have power to do it; but what are the principles upon which we ought to act in thinking fit to add another guardian to the mother, having regard to the rights conferred upon her by the earlier part of the section? I say nothing in this case about personal misconduct, because we have nothing of the sort to consider. Of course, personal misconduct, if proved, would be ample ground for interference. There can be no conceivable ground for our interfering except the benefit of the infant. That is the ground upon which the Court always acts in considering these questions of guardianship—whether they arise as to fathers or testamentary guardians or anybody else. The benefit of the infant, and that alone, is what we have to look at. Now, here it is that I think the learned judge was mistaken. I cannot help thinking, from the little note we have had read of his judgment, that he was guided by the old practice which is summed up in the passage from Simpson on Infants, ed. 1875, p. 120, which has been referred to. After saying that in the case of the death of the father, and there being no testamentary guardian the mother was guardian by nurture, and had the right to the care and custody of her children, the learned

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author says this as to the old practice: "She will not necessarily be superseded if she marry again, but the practice now is, if the mother marry again, to have a reference to appoint a new guardian." That is to say, if, under such circumstances, the mother married again, an inquiry was directed if necessary to see whether it was desirable that she should continue. But are we to introduce the old practice and pass it on to the new statutory enactment? I say No, not at all. I do not say that her marriage again goes for nothing. It may go for a good deal. If she had married some gentleman who might interfere with the boy and render it desirable that the boy should be removed from her influence or anything of that kind, it might go for a good deal; but all you can say here is that the mother has married again, and that her husband is of a different religion. So long as the boy is left alone and brought up properly, why should the Court interfere? I think that grounds must be shewn that, having regard to the real benefit of the infant, the Court ought to interfere; and if no such ground is shewn, it would be the duty of the Court not to interfere. Those are the principles which appear to me to be sound and upon which we ought to act.

Now, if we look, as we ought, at the benefit of the infant, I take the affidavit of the trustee as shewing conclusively that there is absolutely no ground for interfering at all. I am very much struck with the third paragraph of that affidavit, which shews that after the mother had married, namely, on May 10, 1897, an order was made by Kekewich J. granting the trustees liberty to pay a certain sum for maintenance and education of this child. That was done six months after she married. There is not a word there said to suggest any impropriety or any desirability for removing the mother. What has happened since? Nothing that I know of. We are sufficiently men of the world to see what are the unfortunate circumstances which have given rise to this litigation. I do not propose to say a word which will give the slightest offence to anybody. There is no imputation against the mother—absolutely none against the gentleman whom Kekewich J. has appointed, and absolutely none against the other gentleman whom the mother

would prefer to be associated with her if anybody was to be associated with her. But I proceed upon the ground that there are no sufficient reasons to justify the Court in thinking fit to appoint anybody to interfere with the mother. There is a period of five years before this boy can possibly go into the army; and, in the face of the affidavit to which I have referred, there is no reason whatever to suppose that it will be in the slightest degree for the benefit of this infant that he should be interfered with at all, or that he should be associated with anybody except his mother as his legal guardian. She will have the benefit of the advice, I hope, of the boy's father's friends and certainly of the trustee. I see no reason at all for interfering; and I think that on principle Kekewich J. has made a mistake, and has not given full effect to the great alteration made by the Act of 1886.

The appeal must be allowed, and the summons asking for the appointment of guardian must be dismissed.

Rigby L.J. I am of the same opinion. The case is fundamentally different from all those cases that preceded the Act, where the Court was dealing with, say, a lady, whether the mother or not, under the then unfortunate state of the law. All those cases must—I do not say be absolutely put aside—but at any rate must be treated as not being authorities for anything to be done under this Act.

Now, as far as I can judge from the different sections of the Act, the Legislature intended to place the husband and wife, with regard to the guardianship, in practically the same position. Whereas the husband had the exclusive right of appointing a testamentary guardian, the wife gets a co-ordinate right. He may appoint, and she may appoint; and, if there is an appointment by each, both persons appointed are guardians. If the case arises which has here arisen, that the mother of the infant is alive, then the second section of the Act says, in effect, that if there is a guardian appointed by the father the mother shall act jointly with that guardian, but if there is no guardian appointed by the father then the mother shall act alone as guardian. Thus a statutory right is created which is not to

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be taken away from the mother without good cause. That is the interpretation of the statute put shortly. It says nothing about the mother marrying again, or as to her marrying a husband of a different religious faith; but it lays down, as a general rule, applicable to all mothers—that is, married or not married at the time—that if there be no guardian appointed by the father the mother shall alone be guardian. That is in accordance with the whole course of legislation. We do not attach now so much importance to the fact that a lady is married as in former times we did. The idea that she is under the control of her husband—though of course it is still true and always will be true to a certain extent—has not been looked upon as a guiding idea to anything like the same extent as it was; and that accounts for the fact that it is not an unmarried mother, but a mother whether married or not, who is to have this privilege. Then the section goes on: "When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

Now, I protest against the idea that one is to look at what was the state of things as to appointments of guardians before this Act, and may bring in old rules, and to that extent repeal the Act. For it would be a repeal of the Act if the Court was to take into consideration now what the Court formerly did under different circumstances, and to apply the old rules to the state of things established by the Act. I protest against that course; and I do not think it is in accordance with the true construction of the Act. I think that wherever the Court is called upon to exercise the judicial discretion which is given to it by this Act, it must go upon the special circumstances of the case, and not upon the general rule formerly existing; and must exercise that discretion in accordance with what is thought best for the infant. Kekewich J. has, in my opinion, gone too far in treating the prior doctrines of the Court as applicable here. I concur with what has been said on both sides, and especially as to this, that there is no personal imputation upon any of these parties, either upon the mother or her husband, who is

supposed to exercise some influence over her, or upon the gentleman appointed by Kekewich J., or upon the other gentleman who is mentioned as a possible guardian. Considering all that, and not seeing anything special here, but rather thinking it would not be for the benefit of the infant to have two guardians with, it may be and probably and possibly would be, conflicting policies, in my opinion, we ought not to interfere. I think it will be better for every one that the state of things which is existing under the Act should not be interfered with.

Vaughan Williams L.J. I entirely agree. I agree not only in the conclusion, but also in the view that has been taken as to the effect of this Act of Parliament upon the position of the wife in relation to guardianship. But I do wish to add two observations: one is that I do not think that a more responsible or difficult jurisdiction can have to be exercised by any judge than that which a judge has to exercise in respect of the guardianship of infants, and I am quite sure that it is not intended by the decision of this Court to-day to depart one iota from the old rule as to not interfering with the discretion of the judge when he has exercised it in respect of this very responsible duty. If such discretion were to be interfered with, the performance of those duties would be almost impossible. But here I do not consider that we are interfering with the discretion of the learned judge. I consider that in this case the learned judge was obviously guided by the consideration that he thought that the old rules laid down in the older cases with regard to the guardianship by mothers of children ought to govern cases under this Act. In that principle of law we think that he was wrong; but I do not understand that there is any intention to depart in any degree from the old rule as to not interfering with the discretion of the learned judge in matters of this sort. The second observation I want to make is this: although we have held to-day that there is no ground brought before us which renders it right that the Court shall act upon the power that the 2nd section gives it (if it shall think fit) to appoint a guardian or guardians to act jointly with the mother, it is not in any way intended to say by our

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decision to-day that that is a power which could only be exercised in cases in which some moral reflection or slur is cast upon the mother. I can conceive all sorts of cases in which it might be, under this Act, fit that the Court should exercise this power, although there might not be any moral reflection of any sort or kind on the wife—that is to say, cases in which it was obviously for the interest of the child that the power of appointing a joint guardian should be exercised.

Solicitors: *Freshfields & Williams; Farrer & Co.; Parker & Parker.*

W. W. K.

ATTORNEY-GENERAL *v.* RUFFORD & CO., LIMITED.

NORTH J.

1899

Jan. 19.

[1899 A. 21.]

Local Authority—Width of Street—"New Street"—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 63.

Held, that the decision of the House of Lords in *Robinson* v. *Local Board of Barton-Eccles*, (1883) 8 App. Cas. 798, as to the meaning of the term "new streets" in s. 157 of the Public Health Act, 1875, governs the construction of the same term in s. 63 of the Towns Improvement Clauses Act, 1847.

A country lane in the neighbourhood of a town, and situate within the district of the urban district council of that town, was defined for the greater part of its length (581 yards) by hedges. On one side of it were buildings, extending for 485 feet along the lane, belonging to brickmakers, who were proposing to erect on the other side of the lane, opposite to their existing buildings, new buildings, which would extend for 233 feet along the lane:—

Held, that by the erection of these new buildings the lane between them and the old buildings opposite would become a "new street" within the meaning of s. 63 of the Towns Improvement Clauses Act, 1847, and subject to the provisions of that section as to width.

An interlocutory injunction was accordingly granted to restrain the defendants (the brickmakers) from building so as to make or lay out the lane as a new street less than thirty feet wide.

MOTION on behalf of the relators and plaintiffs for an injunction to restrain the defendants, until the trial of the action or further order, from building or erecting any buildings or erections on land adjoining or abutting on Brick Kiln Lane, in the urban district of Stourbridge, so as to make or lay out that lane as a new street less than thirty feet wide.

The plaintiff council had succeeded to the rights and powers conferred upon commissioners incorporated by the Stourbridge Improvement Act, 1866 (29 & 30 Vict. c. clxix.).

With that Act the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), was (with certain exceptions immaterial for the present purpose) incorporated.

By s. 63 of the latter Act, "It shall not be lawful to make or lay out any new street unless the same be of the prescribed width, or where no width is prescribed, unless the same, being

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a carriage road, be at least thirty feet wide, or, not being a carriage road, be at least twenty feet wide."

Sect. 62 of the Act of 1866 empowered the commissioners "from time to time to make, alter and repeal such by-laws as they think proper with respect to (inter alia) the width and construction of new streets." No by-law applicable to the present case had been made.

Brick Kiln Lane was an ancient public carriage road in the Stourbridge district, and was of a width varying from about nineteen feet to about twenty-eight feet. The length of the lane from one end to the other was 581 yards. With one exception there was and had been only one building (comprising two cottages) on the west side of the lane, and there were no buildings on the east side of the lane when this action was commenced. There were formerly two cottages on the east side of the lane, which had been recently removed by the defendants. No other buildings had ever existed on the east side of the lane. The lane was bounded on either side by hedges, except that there was a brick wall in front of the two cottages on the western side, and except that on the same side, at the northern end, the defendant company had erected some buildings, which they used as a bath and glazed brick factory. Those buildings immediately adjoined and abutted on the carriageway of the lane and extended along the side of the carriage road for 485 feet or thereabouts. On June 14, 1898, the defendants gave notice to the district council of their intention to erect upon land on the east side of the lane, and immediately opposite to their factory on the west side, some new buildings, the outer walls of which would be 233 feet in length, and would immediately adjoin and abut upon the east side of the lane, and would be throughout their whole length at a distance of twenty-one feet from the outer walls of the defendants' factory on the west side of the lane. The district council approved of the defendants' plans, but on the condition that the defendants should set back their new buildings to a line which would make the street thirty feet wide. The defendants refused to comply with this requirement, and gave notice to the district council that they intended to commence

the construction of their new buildings in such a way as to leave the road about twenty-two feet wide. This action was then commenced.

Farwell, Q.C., and *R. Cunningham Glen*, for the motion. The expression "new street" is not limited to a street made for the first time across a field; it includes an old country road which is, by the erection of houses along it, being converted into a street. This construction has been put by the House of Lords upon the similar expression in s. 157 of the Public Health Act, 1875: *Robinson* v. *Local Board of Barton-Eccles*. (1) An old highway becomes a "street" when buildings are placed on both sides of it: *Hendon Local Board* v. *Pounce*. (2)

Neville, Q.C., and *R. E. Moore*, for the defendants. In order that a country lane may be converted into a street there must be some degree of continuity of buildings: *Robinson* v. *Local Board for Barton*. (3) See the observations of Jessel M.R. (4) According to the argument of the plaintiffs, if there were a road several miles in length with a building on one side of it at one end and a building on the other side of it at the other end, and no other buildings, it would be a street. That would be an absurd result. The character of the lane will not be altered by the buildings which the defendants propose to erect. The defendants, who are brickmakers, have sheds on one side of the lane, and they propose to erect sheds on the opposite side. There are mines beneath the surface, and the surface is constantly subsiding. The situation is not suitable for the building of houses. No one would care to reside in such a place. The regulation of the width of streets is made for sanitary purposes.

Farwell, Q.C., in reply.

NORTH J. I must hold that this lane is a "new street" within the meaning of the decisions, taking them to be summed up in *Robinson* v. *Local Board of Barton-Eccles* (1) in the House of Lords. There is, no doubt, a difficulty in saying at what precise moment some country lane has become a street,

(1) 8 App. Cas. 798.
(2) (1889) 42 Ch. D. 602.
(3) (1882) 21 Ch. D. 621.
(4) 21 Ch. D. 633.

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as Jessel M.R. pointed out when that case was before the Court of Appeal. He said (1): "There are two ways in which a street may come into existence where there was no street before. A person may take a grass field or a country lane (for, in my opinion, it makes no difference whether or not there was a public highway and lane, or a footpath existing before which is thrown into the street and is utilized, or whether there was nothing but a mere plot of grass land out of which a new roadway is made), he may take it and build continuous lines of houses so as to form what is commonly known as a street. When I say continuous lines, I do not mean that there are to be no breaks or intervals, but there must be a certain degree of continuity." Then he points out another way in which a street may arise, "that is, where it is not from the first laid out as a street in a formal manner, but may be considered to grow up, so to say, of itself. This often happens where there is an existing highway, and people build houses along the sides of that highway, so that, without any intention of laying out a street, the street grows. When does it become a street? This question cannot be answered until you know the locality." No doubt there may be great difficulty in saying in the latter case when the highway does become a street. The Master of the Rolls points out that when there are continuous lines of buildings on both sides that is one way in which the highway may become a street. But he says that a "new street" does not necessarily mean that there are houses without any break or interval, though there must be "a certain degree of continuity." In the present case, there being buildings on one side of the road, extending for 485 feet, it is proposed to erect a building which will extend for about 233 feet along the other side. Suppose that, instead of putting up a continuous building there, a row of cottages of that length had been erected—perhaps some twelve to twenty cottages—could it have been said then that the lane was not a new street? Mr. Neville hardly denied that that would be so, but he said that there was a difference between that case and the present, and in a certain sense there is. What the defendants are doing is defining the line of the road

(1) 21 Ch. D. 632.

—I do not use that word in a technical but in a general sense—defining the road along which people are to pass by erecting a wall and altering the state of things so that there will be a wall on each side limiting the width of the road to twenty-one or twenty-two feet. I think that that which will be the line of road between these walls will be a "new street" within the meaning of s. 63. I think I am justified in coming to this conclusion, not only by the view which Lord Selborne expressed in *Robinson* v. *Local Board of Barton-Eccles* (1), but also by what was said by Jessel M.R. in the same case.

Solicitors: *Smiles, Ollard & Co., for W. W. Goddard, Stourbridge; Church, Rendell, Todd & Co., for C. Herbert Collis, Stourbridge.*

W. L. C.

In re HANKEY. CUNLIFFE SMITH *v.* HANKEY.

[1898 H. 2155.]

Administration—Administration of Estates Act, 1869 (*Hinde Palmer's Act*, 32 & 33 *Vict. c.* 46)—*Preference.*

Simple contract debts cannot be paid in preference to specialty debts in the case of an insolvent estate.

THIS was a summons by specialty creditors of Frederick Alers Hankey, deceased.

The defendants were the administratrix and heir-at-law of the deceased.

The applicants were the only specialty creditors; their debt was a large one. The administratrix had paid the simple contract debts, which were none of them large individually, in full, leaving insufficient assets to pay the applicants.

The point for decision was whether the administratrix was entitled to prefer the simple contract creditors to the specialty creditors.

(1) 8 App. Cas. 798.

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Henry Terrell, Q.C., and *Stewart-Smith*, for the plaintiffs. There are several cases which shew that the effect of Hinde Palmer's Act is not to enable an executor to retain the amount of a simple contract debt due to himself to the prejudice of a specialty creditor: *In re Briggs* (1); *In re Bentinck* (2); *In re Jones* (3); *Wilson* v. *Coxwell.* (4) And there is no difference between the right to retain, which is merely the right to prefer oneself, and the right to prefer one creditor to another. That the two rights are really the same and founded on the same principle has been recognised from the earliest times: Keilwey's Reports, 20 Hen. 7, pl. 2; *Talbot* v. *Frere.* (5) The object of Hinde Palmer's Act was to promote equality, and not to make the inequality allowable still greater: it was to take away privilege, not to create new privilege.

The only authority that can be relied on by the other side is *In re Orsmond.* (6) That case is inconsistent with the others cited, and wrong on principle.

Vernon Smith, Q.C., and *Ingle Joyce*, for the administratrix. The only decision relating to the right to prefer is that of Kekewich J. in *In re Orsmond* (6), in which it was distinctly held that an executor can pay simple contract creditors to the exclusion of the specialty debts. In *In re Williams' Estate* (7) the point was not argued, but it goes to shew that the right of preference has been enlarged by Hinde Palmer's Act. There is a difference as to accountability between retaining and paying to other people, for in the former case the executor would have to account for what he has kept for himself, and in the latter he would have to account, if he has to account, for what he has paid away.

NORTH J. It seems to me that the right of an executor to prefer one creditor and the right to retain his own debt are in many respects the same thing in substance and principle: though no doubt the latter can, while the former cannot, be exercised after an administration decree. Mr. Joyce says that

(1) W. N. (1894) 162.
(2) [1897] 1 Ch. 673.
(3) (1885) 31 Ch. D. 440.
(4) (1883) 23 Ch. D. 764.
(5) (1878) 9 Ch. D. 568.
(6) (1887) 58 L. T. 24.
(7) (1872) L. R. 15 Eq. 270.

there is a difference, because in one case the liability of the executor, if he were liable, would be to account for what he had kept, and the other to repay what he had paid away. Of course one may draw a distinction in words. The phrases might be turned round; and you might say that in one case the executor had to repay what he had paid himself, and in the other he had to account for what he had improperly paid to creditors. Mr. Joyce also asks me to follow the exact words of the Act, which says that in the administration of the estate of every person "no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree"—and it does not stop there, for it proceeds—"and be paid accordingly out of the assets."

How is that consistent with saying that the executor can pay some creditors, leaving others, particularly specialty creditors, who but for this enactment would have had priority, out in the cold? It might very well be that the effect was that the power to prefer had been altogether abolished: but I cannot now go so far as that, because there are decisions to the contrary. The only question is whether the right to prefer is not to be confined to a preference between persons in the same class of creditors. The right to prefer is not different from the right to retain; as was pointed out by Sir George Jessel in *Talbot* v. *Frere*. (1) The case of *In re Williams' Estate* (2) has really nothing to do with this point.

Then in respect of the other cases—*In re Jones* (3); *In re Briggs* (4); *Wilson* v. *Coxwell* (5)—they relate to retainer no doubt: but they all shew that the right of preference, which is the same thing, has not been enlarged so as to enable an executor to prefer one creditor against another of higher degree. And in *In re Bentinck* (6) the same principle was acted on.

(1) 9 Ch. D. 570.
(2) L. R. 15 Eq. 270.
(3) 31 Ch. D. 440.
(4) W. N. (1894) 162.
(5) 23 Ch. D. 764.
(6) [1897] 1 Ch. 673.

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Then it is said that the decision of *In re Orsmond* (1) is directly the other way. I have to choose between that one case and the others. I adopt the other decisions as being more in accordance with the words and the intention of the Act. I have the less difficulty in deciding against the authority of that case because I do not find the judgment, as reported, very intelligible. I hold that the executor had no power to pay the simple contract creditors in full to the prejudice of the specialty creditors.

MINUTE:—The judge being of opinion that the estate of the intestate was distributable between the specialty and simple contract creditors of the intestate in the proportions which the simple contract and specialty debts bore to one another respectively, and that the defendant was not entitled to apply any part of the estate attributable to the specialty creditors under the above direction in payment of the debts due to the simple contract creditors.

Solicitors: *Meynell & Pemberton; Hollams, Sons, Coward & Hawksley.*

D. P.

NORTH J.
1899
Jan. 25.

PEMBERTON *v.* BARNES.

[1869 P. 87.]

Will—Reverter—Fee Simple Conditional—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 3 *—Devise.*

The possibility of reverter on failure of a fee simple conditional is "a right of entry for a condition broken" within the meaning of and devisable by force of s. 3 of the Wills Act, 1837.

BY an indenture dated May 16, 1839, made in contemplation of the marriage of Thomas Barnes and his wife Ann, a moiety of an estate known as the Tring estate was limited subject to life interests of the intended husband and wife to such uses as Thomas Barnes and Ann Barnes should by deed appoint, and in default of appointment to Thomas Barnes and Ann Barnes as joint tenants in fee simple.

By a deed-poll dated September 26, 1869, John Barnes and Ann Barnes appointed their moiety of the Tring estate after

(1) 58 L. T. 24.

their death to the use of trustees for a term of 200 years; and, subject to the trusts of the term, to the use of John Barnes, the son of the appointors, for life, and after his death to the use of his first and other sons in tail male, with remainders over.

A partition action was instituted by the owners of the other moiety of the Tring estate in 1869. The Barnes family opposed a sale; but the Court of Appeal (L. R. 6 Ch. 685), overruling the Vice-Chancellor, ordered a sale of the whole of the Tring estate on July 14, 1871, and the estate was in May, 1872, sold by auction. This was a petition for dealing with funds in court representing part of the moiety of the purchase-money belonging to the Barnes family.

Thomas Barnes had one son only, John Barnes above named. John Barnes had one son only, Thomas Kay Barnes. Ann Barnes died in February, 1871. Thomas Barnes died in March, 1872, without having devised his residuary real estate or dealt specifically with the Tring estate by his will: but having disposed of his personal estate. John Barnes died in April, 1891, having made a will containing a residuary devise of real estate. Thomas Kay Barnes, the only son of John Barnes, died January 19, 1898, without having had issue.

A part of the Tring estate was copyhold of the manor of Bunstrix, a manor in which there is no custom to entail, so that the effect of the appointment of September, 1869, was to create in Thomas Kay Barnes a fee simple in remainder in the Bunstrix copyholds, on the determination of the previous life estate conditional on his having issue male; which estate determined on his death without such issue.

A question raised by this petition was who was entitled to the money in court representing the Barnes moiety of the Bunstrix copyhold.

Badcock, for the petitioners, the trustees of the will of Thomas Barnes; and three of his four co-heiresses according to the custom of the manor. The possibility of reverter was neither assignable nor devisable; it therefore, on the death of Thomas Kay Barnes without issue, devolved on the four co-heiresses of Thomas Barnes.

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Robbins, for the other co-heiress of Thomas Barnes. Independently of the Wills Act, 1837, the possibility of reverter was not devisable or descendible; it was not an estate. The law does not recognise two fee simples; when there was in existence a fee simple conditional no estate could co-exist. Before the statute De Donis there could have been no estate or devisable interest after an estate tail: *Jones* v. *Roe* (1); *Earl Stafford* v. *Buckley* (2); Fearne on Contingent Remainders, 10th ed., vol. i. 282, n.; *Willion* v. *Berkley* (3); Co. Litt. 18 a, 22 b; *Marquis of Winchester's Case* (4); Challis on Real Property, 2nd ed. 73.

Sect. 3 of the Wills Act does not contain any words that catch a mere possibility of reverter. It does not extend to every possible subject: for this reason it is doubted by Mr. Joshua Williams whether three witnesses are not still required to a will in order to pass the possibility a lord has of an escheat in case a tenant in fee dies without heirs intestate: Williams on Real Property, 14th ed. p. 130, note (*v*). The Law of Real Property Amendment Act (8 & 9 Vict. c. 106), s. 6, which makes an executory interest or possibility coupled with an interest assignable by deed, does not apply to the mere possibility of reverter.

Fuller, for persons claiming under the will of John Barnes. This possibility of a reverter was a descendible and devisable interest, and descended to John Barnes and passed under his will: Burton's Compendium, s. 641; *Willion* v. *Berkley* (5); *Ingilby* v. *Amcotts* (6); *Roe* v. *Griffiths*. (7)

Vernon Smith, *Q.C.*, and *W. G. Clay*, for a person claiming under a residuary bequest in the will of Thomas Barnes. There was a conversion by the sale in the partition action; the interest whatever it was was personalty. It was a possibility coupled with an interest, and as such devisable independently of the Wills Act: *Earl Stafford* v. *Buckley* (2); Sheppard's Touchstone, 239; *Lampet's Case* (8); *Doe* v. *Tomkinson* (9);

(1) (1789) 3 T. R. 88.
(2) (1750) 2 Ves. Sen. 171, 180.
(3) (1561) 1 Plowd. 223, 248.
(4) (1583) 3 Rep. 3 b.
(5) 1 Plowd. 247, 248.
(6) (1856) 21 Beav. 585, 591.
(7) (1766) 1 W. Bl. 605.
(8) (1612) 10 Rep. 46 b.
(9) (1813) 2 M. & S. 165.

Moor v. *Hawkins* (1); *Jones* v. *Roe* (2); *Roe* v. *Griffiths* (3); Challis on Real Property, 2nd ed. 66.

[NORTH J. I should like to hear any observations you may wish to make on *Doe* v. *Simpson* (4), which seems to treat the possibility of reverter as an estate: and one too in which the fee simple conditional might be merged.]

That case is in favour of the view that the interest is devisable. We say that it is within the definition of real estate in the Wills Act, and, therefore, passes by virtue of s. 3; and, further, that it is, within the words in that section, a right of entry: *Magdalen Hospital* v. *Knotts* (5); and can be properly called a right of entry for a condition broken: Co. Litt. 201 (a), 345 (a).

Procter, in the same interest. At common law a possibility was not devisable, but in equity a possibility in personal estate was assignable and devisable: Fearne on Contingent Remainders, 10th ed. vol. i. 548. But in vol. ii. p. 23, a possibility of reverter on a grant of a qualified or determinable fee is classed as a contingent interest—as something more than a mere expectancy.

Hadley, for a person claiming the fund as realty under the will of Thomas Kay Barnes. I adopt the argument that the possibility of reverter was not devisable, but descended to Thomas Kay Barnes. It then merged in the fee simple conditional, and his estate became an unconditional fee: *Doe* v. *Simpson* (4); and so passed by his will.

Robbins, in reply.

NORTH J., after stating the facts:—The effect of the appointment of 1869 on the copyholds of the manor of Bunstrix, in which there was no custom to entail, was to create a fee simple in Thomas Kay Barnes conditional on the birth of issue male, leaving an unappointed possibility of reverter in Thomas Barnes as the survivor of himself and wife.

The question is, what became of that possibility of reverter?

(1) (1765) 2 Eden, 342.
(2) 3 T. R. 88.
(3) 1 W. Bl. 605.
(4) (1838) 4 Bing. N. C. 333, 348; 5 Scott, 770: affirmed *Doe* d. *Blesard* v. *Simpson*, 3 Man. & G. 929.
(5) (1878) 8 Ch. D. 709, 727.

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Could it be dealt with by Thomas Barnes? If not dealt with, I think it quite clear that it would descend on his death to his heir, from the case of *Doe* v. *Simpson*. (1) There is a good deal of authority on the point; but I think that case sufficient to shew that such an interest can descend: and there was no disposition of it by his will.

The next question is whether John Barnes could devise it. He made a will by which he did devise it, if he could. I think that he could. The first consideration is, what is the nature of such an interest? If the case of *Doe* v. *Simpson* (1) was all that I had to guide me, I should have said that a possibility of reverter was an estate; for this reason. In that case there was a conditional fee created by a father's will in his eldest son, who was also his customary heir, and the possibility of reverter being undisposed of descended to the son. The decision was that the interests were united, and a fee simple absolute was vested in the son. The reason of the decision is clearly put by Tindal C.J.: "We therefore think Dr. John Simpson took under his father's will a fee simple conditional at common law; and that upon the death of the father, the possibility of reverter in the father descended to and came upon the son, and that the fee simple absolute, and the fee simple conditional coming together, the fee conditional merged therein, according to the doctrine laid down by Lord Hardwicke in 2 Ves. Sen. 355." The doctrine referred to in that case is found in the case of *Bishop of Sodor and Man* v. *Earl Derby* (2) in these words: "for which I rely on the case in Carthew (3), that a fee simple conditional cannot stand together with an absolute fee, but will be merged in it." If those cases stood alone, I should have thought that that in which an estate merged must itself have been a larger estate, and that a possibility of reverter in which a fee simple conditional was merged was itself an estate within the ordinary meaning of the term. But I must say that, on the other hand, several authorities have been cited to me which seem somewhat inconsistent with

(1) 4 Bing. N. C. 333, 348; 5 Scott, 770; affirmed *Doe* d. *Blesard* v. *Simpson*, 3 Man. & G. 929.

(2) (1751) 2 Ves. Sen. 337, 355.

(3) *Symonds* v. *Cudmore*, (1692) Carth. 257.

that view, and to negative that conclusion that a possibility of reverter is itself an estate. The question does not often arise, and I do not think it necessary now to decide between these conflicting authorities, because I think that the Wills Act applies to the present case.

I do not think it necessary to decide whether it comes within the definition of real estate in s. 1 of the Wills Act, 1837, and is devisable as real estate under the opening words of s. 3: because I think that it certainly passes under the later words in that section. The section enacts, "That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, ... all rights of entry for conditions broken and other rights of entry." It seems to me that the rights of entry there mentioned include a right of entry on a breach of condition or determination of a fee simple conditional. There were several passages cited from Coke upon Littleton pointing to this—that where a fee simple is given to a man conditionally on his having heirs, it is not an improper use of language to speak of the condition having been broken if he has no heir. That is also stated in the late Mr. Challis's valuable book on Real Property (2nd ed. p. 201), and it is a subject on which his opinion has deservedly great weight. I find this passage in reference to s. 3 of the Wills Act. "The same enactment expressly includes within its provisions 'all rights of entry for conditions broken, and other rights of entry.' This language is undoubtedly sufficient to include the possibility of the reverter of an estate of fee simple, upon breach (or non-performance, as the case may require) of a condition."

I think, therefore, that such possibility of reverter would pass under the words "residuary estate," or any other suitable words; and that it did not pass under the will of Thomas Barnes, but did pass under the will of John Barnes.

Solicitors: *Thomas Bore, for J. S. Jackson, Carlisle; Marcus & Barraclough; Metcalfe, Birkett & Rowlatt, for Mounsey & Co., Carlisle; Ullithorne, Currey & Currey, for Hodgson, Carlisle.*

D. P.

NORTH J.
1899
Jan. 26.

WALL *v.* LONDON AND NORTHERN ASSETS CORPORATION.

[1898 W. 4271.]

Company—Evidence—Articles of Association—Voting.

An article provided that votes tendered at a meeting and not disallowed at the meeting or an adjournment thereof should be valid for all purposes :—
Held, that in the absence of fraud or mala fides a resolution for voluntary winding-up could not be impeached upon the ground that votes had been improperly received.

THIS action was brought by a shareholder (suing on behalf of himself and all other shareholders in the London and Northern Assets Corporation, Limited). The plaintiff claimed—(1.) to have special resolutions to wind up the company and appoint as liquidator Alfred Akers (co-defendant with the company) declared void; and (2.) to restrain the defendants from acting on the resolutions. The action was brought on on motion for an interlocutory injunction in terms of the second claim.

The plaintiff alleged, as the foundation of his action, that if, at the first of the two meetings necessary to pass the special resolutions, votes improperly allowed had been rejected and other votes improperly received had been disallowed, the resolutions would not have been passed by the necessary three-fourths majority of votes. It was admitted that unless it could be shewn that some of the votes that had been received could be avoided, the resolutions were duly passed. The defendants relied on art. 63 of the company's articles of association making, as they contended, the decision of the person who accepted the votes final.

The first meeting for the purpose of passing the special resolutions was held on November 11, 1898. On a show of hands being taken, it was declared that the resolution was not carried by the requisite three-fourths majority, the figures being twenty-two in favour and nine against the resolutions. A poll was demanded and taken on November 30. The plaintiff and another person acted as scrutineers. A number of proxies

tendered in favour of the resolutions were on that day objected to by the plaintiff, and proxies tendered by him against the resolutions were objected to by others. The counting was not completed on that day; it was continued into the next day, when the scrutineers made a report to the chairman, who accepted the proxies now objected to, and declared the resolutions duly passed.

At the confirmatory meeting held on December 22 the resolutions were agreed to unanimously.

Art. 63 was as follows:—

"No objection shall be made to the validity of any vote excepting at the meeting at which such vote shall be tendered, or at the meeting (if any) to which such meeting shall be adjourned in the regular course of business, and every vote, whether given in person or by proxy, not disallowed at any one of such meetings, shall be deemed valid for all purposes whatsoever."

Farwell, Q.C., and *Coldridge*, for the plaintiff. The meaning of the article does not go to saying that a resolution cannot be avoided, if there is sufficiently strong evidence that votes have been improperly admitted, simply because the chairman has allowed them; for, as Kekewich J. pointed out, fraud would be possible: *Young* v. *South African and Australian Syndicate* (1); it merely means that the chairman's admittance is final unless the votes are impeached: *In re National Debenture and Assets Corporation* (2); *Young* v. *South African and Australian Syndicate* (3); *In re Horbury Bridge Coal, Iron and Waggon Co.* (4)

Neville, Q.C., and *W. F. Hamilton*, for the defendants. The rule of construction laid down by Lord Wensleydale for all written instruments, adopted by Lord Bramwell in *Hill* v. *East and West India Dock Co.* (5), is the only common sense rule: it is that "the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some

(1) [1896] 2 Ch. 275.
(2) [1891] 2 Ch. 505.
(3) [1896] 2 Ch. 268.
(4) (1879) 11 Ch. D. 109.
(5) (1884) 9 App. Cas. 448, 464.

NORTH J. 1899 WALL v. LONDON AND NORTHERN ASSETS CORPORATION.

absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

This article in terms can have but one meaning. In *In re Ennis and West Clare Ry. Co.* (1) it was held that a certificate of registration of a company under the Act of 1862 really was conclusive. The statement in Mr. Buckley's note, 7th ed. p. 212, that the chairman's ruling that a resolution is carried can be challenged by legal proceedings, is not borne out by the authorities he cites. *In re Brynmawr Coal and Iron Co.* (2) and *In re Dudley and Kingswinford Tramways Co.* (3) are authorities in favour of a literal interpretation of the article.

Farwell, Q.C., in reply.

NORTH J. The article in question is not of very general application; it does not go to the extent of making the chairman's decision final as to a resolution being passed. If he made a mistake in counting, for instance, the article would not apply. All the rule says is that any objections to votes are to be taken at the meetings, "and every vote not disallowed at any one of such meetings shall be deemed valid for all purposes whatsoever." That is the same as "shall be valid," or "shall be treated as valid." I do not agree with the suggestion that such a provision, if it precluded the admission of evidence that the decision of the chairman was mistaken, would apply even in a case of fraud: *Young* v. *South African and Australian Syndicate.* (4) Any fraudulent ruling would, I have no doubt, be vacated by a competent Court. If in this case fraud in counting votes could have been shewn, the resolution could not stand. But the utmost that can be said in this case is that the chairman has taken an erroneous view as to the validity of some of the votes. In my opinion, the meaning of the article is that all objections to votes at a meeting must actually be taken and dealt with at the meeting, and the decision as to their validity by the person who presides is to be final on that

(1) (1879) 3 L. R. Ir. 94.
(2) W. N. (1877) 45.
(3) (1893) 63 L. J. (Ch.) 108.
(4) [1896] 2 Ch. 275.

point. The only difficulty I felt was as to whether the article could not be construed to mean merely that all proceedings founded on the chairman's ruling as to votes are to be deemed valid when they are not challenged by legal proceedings. But I do not think I can come to the conclusion, on the actual words of the article, that the meaning is to be so limited. The motion must be refused.

Solicitors: *Greville, Son & Jarvis; Baker, Blaker & Hawes.*

D. P.

STIRLING J.

1899

Jan. 11;
Feb. 16.

In re ADAMS AND PERRY'S CONTRACT.

[1898 A. 1501.]

Will—Construction—Charge of Real Estate with Debts and Legacies—Devisees in Trust—Vesting of Legal Estate—Trust to Pay or permit Tenant for Life to Receive Rents and Profits—Implied Power of Sale—Law of Property Amendment Act, 1859 (*Lord St. Leonards' Act*, 22 & 23 *Vict. c.* 35), *s.* 14.

A testator by his will dated in 1868 appointed his wife executrix thereof, and directed payment of his debts without saying by whom, and, after bequeathing certain pecuniary legacies, he gave the residue of his real and personal estate to two other persons upon trust as to his real estate to pay to or permit and suffer his wife to receive the rents and profits for her life, and after her death upon trust to pay to or permit and suffer his niece to receive the rents and profits for her life for her separate use; and after declaring certain trusts with regard to his personal estate, he directed his trustees after the death of the survivor of his wife and niece to pay two pecuniary legacies, and after payment thereof to stand possessed of his real estate and the residue of his personal estate upon certain other trusts. The trustees asked for a declaration that they had power under s. 14 of Lord St. Leonards' Act to sell the real estate:—

Held, (1.) upon the principle of *Greville* v. *Browne*, (1859) 7 H. L. C. 689, that there was a charge upon the real estate of the debts and immediate legacies, and also of the two future legacies; (2.) that the charge of the debts and immediate legacies being unaccompanied by any express direction to the trustees to pay, did not vest the legal estate in them; (3.) that the form of the gift to the widow, in the absence of any trust for her separate use, vested the legal estate in her for her life, the purposes of the will not requiring that the legal estate should vest in the trustees during her lifetime; (4.) that, the testator not having devised the real estate to the trustees for his whole interest therein, the trustees had no power to sell under s. 14 of Lord St. Leonards' Act.

Doe v. *Biggs*, (1809) 2 Taunt. 109, and *Doe* v. *Bolton*, (1839) 11 Ad. & E. 188, followed.

Harton v. *Harton*, (1798) 7 T. R. 652, and *Van Grutten* v. *Foxwell*, [1897] A. C. 658, distinguished.

THIS was a summons taken out under the Vendor and Purchaser Act, 1874, by the vendors, who were trustees of the will of the late Alexander Penprase, asking for a declaration that they as such trustees had power to sell the real estate comprised in the contract for sale, being real estate devised by the will of the said Alexander Penprase, deceased, and that they

could make a good title thereto, and give good receipts for the purchase-money thereof to the purchaser.

The contract was entered into on May 17, 1898, on a sale by public auction, subject to certain conditions of which the last was as follows: "The vendors are the trustees of the will of the said Alexander Penprase and sell under powers conferred on them by virtue thereof, and the concurrence of the persons beneficially interested in the purchase-money or the property shall not be required."

By his will dated March 21, 1868, the testator appointed his wife sole executrix thereof, and directed his just debts and funeral and testamentary expenses to be paid as soon as conveniently might be after his decease, but he did not mention any person in particular by whom they were to be paid, and, subject thereto, he gave to his wife certain specific chattels for her absolute use. The testator then gave certain pecuniary legacies, and he proceeded as follows: "And as to all the rest residue and remainder of my real and personal estate and effects not hereinbefore disposed of by this my will I give devise and bequeath the same unto the said James Mayne and Samuel Wise Adams their heirs executors administrators and assigns upon the trusts and for the ends intents and purposes hereinafter declared of and concerning the same, that is to say as to my freehold estate upon trust that my said trustees and the survivor of them and the heirs executors administrators and assigns of the survivor do and shall pay to or permit and suffer my said wife to receive and take the rents and profits thereof during her life and after the decease of my said wife in trust to pay to or permit and suffer my niece Eliza Adams the wife of William Adams of Newton Ferrers aforesaid gentleman to receive and take the same during her life for her own sole separate use. . . . . And as to my personal estate and effects upon trust within six calendar months after my decease to get in sell and convert the same into money and to invest the same and my ready money on Government or real security in England and after payment of all current expenses to pay the income thereof unto my said wife during her life and after the decease of my said wife to pay the income thereof to my said niece,

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Eliza Adams during her life for her sole separate use . . . . and after the decease of my said niece or if my said niece shall die in the lifetime of my said wife then upon the decease of the survivor of them my said wife and niece I give and direct my said trustees to pay to the said William Adams and to Ellen Clara Kingcome the daughter of my friend Sir John Kingcome to each and such one of them as shall be then living the sum of 150*l.* and I declare that my said trustees after payment of the said sums of 150*l.* and 150*l.* or such of the said sums as shall be payable shall stand possessed of my said real estate and the residue of my personal estate in trust for all and every the child or children of my said niece Eliza Adams if more than one in equal shares."

The testator died on August 22, 1869, and his will was proved by his widow on October 5, 1869. On June 18, 1881, the widow died. On March 2, 1898, Mrs. Adams died; and thereupon this sale took place by the trustees of the testator's will. The purchaser objected that the trustees had no power to sell.

Upjohn, Q.C., and *Manby*, for the summons. The trustees have power to sell under Lord St. Leonards' Act, s. 14 (1), since upon the true construction of this will there is a charge of debts and legacies on the real estate, and a devise of the estate so charged to the trustees for the whole of the testator's interest therein. That the debts and legacies are charged on the real estate is clear from *Withers* v. *Kennedy* (2) and *Greville* v. *Browne*. (3) The trustees take the entire legal estate by

(1) Sect. 14 provides as follows:— "Where by any will which shall come into operation after the passing of this Act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof. . . . ."

(2) (1833) 2 My. & K. 607.

(3) 7 H. L. C. 689.

reason of the direction to pay such debts and legacies. This case falls within *Creaton* v. *Creaton* (1), the only difference between that case and the present being that there the trustees were also executors.

Creaton v. *Creaton* (1) has been followed in *Spence* v. *Spence* (2); *Marshall* v. *Gingell* (3); *In re Brooke.* (4) See also *Fenwick* v. *Potts.* (5)

[STIRLING J. Is it not necessary that the trustees should take the legal estate from the death of the testator.]

In re Tanqueray-Willaume and Landau (6), shews that they do. Where there is a devise to trustees and their heirs indefinitely the onus of shewing that their estate is limited is on those who dispute their title: *Baker* v. *White* (7), per Jessel M.R.

[STIRLING J. referred to *Doe* v. *Bolton.* (8)]

The purchaser is precluded by the conditions of sale from taking this objection: *In re Ryan and Cavanagh.* (9)

Jenkins, Q.C., and *Kenyon Parker*, for the purchaser. The trustees have not the legal estate in this property.

During the lifetime of the widow she took the legal estate: *Doe* v. *Biggs* (10); then the legal estate was vested in the trustees for the life of the niece by reason of the provision for her separate use, and then the two reversionary legacies became payable. With respect to those legacies, the testator directs his trustees after payment thereof to stand possessed of "my said real estate and the residue of my personal estate." He does not say "the residue of my real and personal estate." The inference is that the legacies are charged on the personal estate in the hands of the trustees, and not on the real estate. A charge of debts or legacies on real estate where the trustees are not executors does not, unless there is a clear devise to the trustees for the purpose of payment, entitle them to sell. There is no indication here that they were to have the legal estate for that purpose. Apart from the two future legacies, they were

(1) (1856) 3 Sm. & Giff. 386.
(2) (1862) 12 C. B. (N.S.) 199.
(3) (1882) 21 Ch. D. 790.
(4) [1894] 1 Ch. 43.
(5) (1856) 8 D. M. & G. 506.
(6) (1882) 20 Ch. D. 465.
(7) (1875) L. R. 20 Eq. 166, 174.
(8) 11 Ad. & E. 188.
(9) (1885) 17 L. R. Ir. 42.
(10) 2 Taunt. 109.

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mere conduit pipes to pass the legal estate to the beneficiaries. The fact of their having to pay those two legacies does not imply that the trustees were to take the legal estate. Consequently the trustees cannot make a title under Lord St. Leonards' Act.

Manby, in reply. Where there is a devise to trustees and at recurring intervals the purposes of the will require that the trustees should take the legal estate; then they also take the legal estate during the intervening period, although the words of the will if taken alone might be such as to vest the legal estate during that period in the beneficiary: *Harton* v. *Harton* (1); *Van Grutten* v. *Foxwell*. (2)

Cur. adv. vult.

Feb. 16. STIRLING J. (after stating the facts as above). The way in which the trustees propose to make a title is under Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 14. [His Lordship read the section.] Now, for the existence of the power thus conferred two things are essential: first, that there should be a charge of the real estate with the payment of debts or legacies or other specific sum of money; and, secondly, that the real estate so charged should be devised to a trustee or trustees for the whole of the testator's estate or interest therein. I have, therefore, to inquire whether both these requirements are satisfied; and first of all I ask, Is there a charge of debts and legacies? Now, undoubtedly, I think, on the principle of *Greville* v. *Browne* (3), there is a charge of debts and of the pecuniary legacies which are given by the testator immediately on his own death. There is a direction that his debts and funeral and testamentary expenses shall be paid; there is a gift, no doubt, of specific chattels, but also a gift of pecuniary legacies, and then as to all the rest, residue and remainder of his real and personal estate and effects the testator gives, devises, and bequeaths the same to the trustees. That, on the principle of *Greville* v. *Browne* (3), creates a charge of debts and legacies. But, further than that, I think, although the language of the

(1) 7 T. R. 652.
(2) [1897] A. C. 658.
(3) 7 H. L. C. 689.

will creates some difficulty, that there is a charge of the two reversionary legacies, as I may call them—that is to say, the two sums of 150*l*. which are directed to be paid after the death of the two tenants for life. As to those, the testator directs the trustees—who, it is to be observed, are not executors—to pay them, and then he declares that after payment of those two sums, or of such of them as shall become payable, the trustees are to stand possessed of his real estate and the residue of his personal estate in trust for the child or children of his niece. Now, the contention of the respondent as to that was that, although the words "after payment" might of themselves create a charge, yet the language of the subsequent part of the will being that the trustees "shall stand possessed of my said real estate and the residue of my personal estate" shewed that there was no charge on the real estate, because the word "residue" was used by the testator with reference to his personal estate only, and that it was to be inferred from that that the testator meant those legacies to be paid out of his personal estate which were in the hands or under the control of the trustees, and did not mean to create a charge upon the real estate. No doubt that creates a certain difficulty; but to my mind the true meaning of the testator is that whatever might be vested in the trustees should be available for the payment of those two legacies. I have, therefore, come to the conclusion that there exists here the first of the two elements required by the Act, namely, a charge on the real estate of the reversionary legacies, as well as of the debts and legacies immediately payable.

I have now to consider the question whether the testator has, in the language of the Act, "devised the estate so charged to the trustees for the whole of his estate or interest therein." The effect of that is that the power does not come into operation unless, upon the true construction of this will, the testator has devised to the trustees the whole of his estate and interest in the real estate which is charged with the debts and legacies. Now, although the testator here purports to devise all the residue and remainder of his estate to the trustees, their heirs, executors, administrators and assigns, it does not follow

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necessarily that the trustees take the whole legal estate. It is established by a long series of decisions that they only take such legal estate as enables them to carry out the trusts imposed upon them; and it is to be observed that, inasmuch as the direction as to the payment of the debts, legacies and funeral and testamentary expenses is a mere general direction without stating by whom it is to be carried into effect, it does not necessarily follow, notwithstanding those words, that the trustees take an estate in fee simple. It was admitted in the argument that the statement given in Jarman on Wills, 5th ed. p. 1145, was a correct statement of the law. That statement is in these words: "The mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them, or the will contains some other indication of an intention to create a trust for the purpose." Now, the trustees are not executors and are not expressly directed to pay the debts or the legacies payable on the testator's death, and it seems to me that under these circumstances it cannot be inferred that the existence of the charge operates to give them the legal estate. It is, however, to be observed that, as regards the reversionary legacies, the charge which I hold to exist is accompanied by an express direction for the payment of the legacies; and in my judgment that direction carried the legal estate to the trustees after the death of the two tenants for life. Furthermore, the second tenant for life takes a life interest for her separate use, and it has long been established that under those circumstances the legal estate during the lifetime of the second tenant for life would vest in the trustees.

The real question which has to be considered is whether upon this will the trustees took the legal estate during the life of the testator's widow, who was the first tenant for life. There is here no direction that the beneficial estate for life taken by the widow is to be for her separate use. The language is, upon trust that "they my said trustees and the survivor of them and the heirs executors administrators and assigns of the survivor do and shall pay to or permit and suffer my said wife to receive and take the rents and profits thereof during

her life." According to the decision in *Doe* v. *Biggs* (1) primâ facie, unless there is some context to the contrary to take away the effect of the words, that would give her the legal estate during her life. It was, however, contended that the doctrine laid down in *Harton* v. *Harton* (2), which has recently been recognised by the House of Lords in the case of *Van Grutten* v. *Foxwell* (3), applies so as to vest the fee in the legal estate in the trustees from the death of the testator. The rule which is established in that case is, if I may be permitted to say so, most accurately and briefly stated by Lord Davey in *Van Grutten* v. *Foxwell* (4), where he says: "It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would but for the recurring duties be construed as uses executed in the beneficiaries." The important words with reference to the present case are those words, "if once in the trustees," and it is obvious from the consideration of the devises in the will which was being considered in that case by the House of Lords, as well as from the statement of it in the preceding portion of the speech of Lord Davey, that those are important words. In that case, as was pointed out by Lord Davey, during the minorities of the testator's children, the purposes of the will required that the trustees should take the legal estate; and after the death of the children it was also clear that the trustees must have the legal estate in order to convey it to the heirs of the children in accordance with the direction in the will. The question there was as to the intermediate legal estate; and the House of Lords held that the intermediate estate was in the trustees on the principle which is there mentioned. Here the question is really whether during the existence of the life of the first tenant for life the legal estate was in the trustees.

Now, as to that, it seems to me that I must follow the law

(1) 2 Taunt. 109.
(2) 7 T. R. 652.
(3) [1897] A. C. 658.
(4) Ibid. 683.

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which, I think, is now well established. I may refer as a statement and example of it to the case of *Doe* v. *Bolton* (1), where the testator devised the manor of A, and also a mansion-house, to trustees in trust to permit and suffer his wife, in case she should wish so to do, to occupy the same and to receive the rents and profits thereof until his son was of age, provided she remained unmarried, and on the son attaining twenty-one then in trust to release, convey, and assure the manor and mansion-house to the son in fee. Then there was a proviso that in case the wife married again, or should not wish to reside in the mansion, the trustees should let the mansion until the son attained twenty-one; and it was there held that although the trustees must take the legal estate in order to convey to the son when of age, that would not prevent the widow from taking the legal estate in the meantime. The judgment of the Court was given by Lord Denman C.J. He says: "It is plain that the trustees must take the legal estate after the death of Mrs. Noble, in order to *convey* the same to her son; but that alone will not prevent her from taking the legal estate in the meantime. Again, it is plain that the words 'to permit and suffer A. B. to receive the rents, issues, and profits' are to be construed, in general, as passing the legal estate to A. B., unless there be anything which the trustees are directed to do, and which makes it necessary for *them* to take the legal estate." That is the test which I must apply here; and the words in the gift in this will, to pay to the wife and to permit her to receive the rents and profits during her life, are to be construed as passing the legal estate to the trustees during her life, unless I can find something which the trustees are directed to do and which makes it necessary for them to take the legal estate. Now, I cannot find anything here. For whatever reason, the testator has thought fit to appoint his wife sole executrix, and he did not impose any duty on the trustees during her life. It seems to me that the case of *Doe* v. *Biggs* (2) must be held to prevail; and, consequently, the testator has not devised his real estate to the trustees for the whole of his estate and interest therein. I must, therefore, declare that the trustees

(1) 11 Ad. & E. 188, 191. (2) 2 Taunt. 109.

of the will are not empowered to sell the real estate comprised in the contract for sale.

Solicitors: *Wedlake, Letts & Wedlake, for G. Gidley, Plymouth; J. Jobson.*

H. B. H.

In re MILNER. BRAY *v.* MILNER.

[1898 M. 2326.]

Will—Construction—Special Power of Appointment—Bequest of Residue to Object of Power—Intention to Exercise.

Testatrix, who was entitled to a special power of appointment of a life interest in certain funds in favour of her husband, by her will, dated in 1882, gave legacies to persons not objects of the power out of her separate estate, or out of the estate and effects over which she had any disposing power, and then proceeded: "I give bequeath and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband absolutely." Testatrix had no other testamentary power of appointment. She died in 1883 leaving her husband her surviving:—

Held, that the power had been exercised.

ADJOURNED SUMMONS.

Under the will of Henry Milner, his daughter, Mrs. Bray, had power by deed or will to appoint a life interest in certain funds to her husband. By her will dated November 16, 1882, she bequeathed as follows: "I bequeath the following legacies out of my separate estate or out of the estate and effects over which I have any disposing power all free from legacy duty namely:" she then specified the legacies, all of which were given to persons who were not objects of the power, and proceeded as follows: "I give bequeath and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband absolutely." She had no other testamentary power of appointment.

Mrs. Bray died on July 20, 1883, leaving her husband her surviving. This was an originating summons raising the question (inter alia) whether she had exercised the special power conferred upon her by her father's will.

STIRLING J.

1899

MILNER, *In re.* BRAY *v.* MILNER.

Lambert, for the plaintiff.

Beaumont, for the husband of Mrs. Bray. I submit that there is enough upon the face of this will to shew an intention on the part of the testatrix to exercise the special power to which she was entitled. The use of the word "appoint" implies that intention. She had no other power of appointment: *Ferrier* v. *Jay* (1); *In re Teape's Trusts* (2); *Hope* v. *Hope* (3); *Thornton* v. *Thornton* (4); *Greville* v. *Browne*. (5)

Upjohn, *Q.C.*, and *M. Romer*, for the defendant, who claimed to be entitled, in default of appointment by Mrs. Bray, to the property in question. The language used by the testatrix in the first portion of her will shews that she knew and appreciated the difference between property subject to a power and property belonging to her absolutely. In the residuary gift there is nothing except the use of the word "appoint" which shews an intention to exercise this special power. No doubt under the Wills Act this would be an exercise of a general power. The decision in *Greville* v. *Browne* (5) rested entirely upon the word "residue." Here the word "residue" cannot be applied to the property subject to this power. In *In re Teape's Trusts* (2) the language was very different. There were clear words there distinguishing property and power, and using both.

Apart from the word "appoint," there is nothing in this will to shew any intention to exercise the power, and we submit that the use of the word "absolutely" is as strong the other way. We rely on *In re Mills* (6), *In re Williams* (7), and *In re Huddleston*. (8) The Court looks at the will alone, and does not regard evidence as to the state of the property at the date of the will or at the death of the testator. The word used in *In re Huddleston* (8) was "direct," which is quite as strong as "appoint."

[They also referred to *Cowx* v. *Foster* (9), *Cooke* v. *Cunliffe* (10), *Gainsford* v. *Dunn* (11), *Thornton* v. *Thornton* (4), and *In re Swinburne*. (12)]

(1) (1870) L. R. 10 Eq. 550.
(2) (1873) L. R. 16 Eq. 442.
(3) (1854) 5 Giff. 13.
(4) (1875) L. R. 20 Eq. 599.
(5) (1859) 7 H. L. C. 689.
(6) (1886) 34 Ch. D. 186.
(7) (1889) 42 Ch. D. 93.
(8) [1894] 3 Ch. 595.
(9) (1860) 1 J. & H. 30.
(10) (1851) 17 Q. B. 245.
(11) (1874) L. R. 17 Eq. 405.
(12) (1884) 27 Ch. D. 696, 702.

Greenwood, for parties in the same interest.

Beaumont, in reply. The testatrix shews by the language she uses in the first part of her will that she intended to exercise all powers vested in her, and it would be strange if where she appoints the residue of everything that she has that she should not be held to have exercised this power in favour of her husband.

Cur. adv. vult.

Feb. 22. STIRLING J. (after stating the facts). It is stated, and for the present purpose I assume, that this power was the only testamentary power to which the testatrix was entitled. This is a circumstance which has in many cases been held to afford evidence of considerable cogency of an intention to exercise such a power: see *Pidgely* v. *Pidgely* (1); *Banks* v. *Banks* (2); *In re Teape's Trusts* (3); *In re Swinburne*. (4) It was contended that evidence of the fact was inadmissible, regard being had to the decisions in *In re Mills* (5), *In re Williams* (6), and *In re Huddleston* (7); but all of them are directed to a different point, and were not intended, so far as I can see, to overrule the series of cases just referred to, not one of which is mentioned in the judgment of any one of the learned judges by whom those decisions were given. The rule applicable to cases of this sort is thus stated by Pearson J. in *Von Brockdorff* v. *Malcolm* (8), in a passage cited with approval by North J. in *In re Cotton* (9): "The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against the other, to which side ought you rather to incline in order to determine

(1) (1844) 1 Coll. 255.
(2) (1853) 17 Beav. 352.
(3) L. R. 16 Eq. 442.
(4) 27 Ch. D. 696.
(5) 34 Ch. D. 186.
(6) 42 Ch. D. 93.
(7) [1894] 3 Ch. 595.
(8) (1885) 30 Ch. D. 172, 179.
(9) (1888) 40 Ch. D. 41, 44.

STIRLING J. 1899 MILNER, *In re.* BRAY *v.* MILNER.

what is the real truth of the case with regard to the intention of a man of whose intention you know nothing except what you find in his will."

In applying a rule of this kind, little assistance is to be got from decisions on wills differing in form and expression. I may state, however, that where a will is found containing a general expression of intention to execute any disposing power to which the testator may be entitled the Court has repeatedly refused to infer the contrary intention from such circumstances as a direction to pay debts or funeral expenses, or legacies, or bequests in favour of persons not objects of the power. As to this, in addition to the cases already mentioned, I may cite *Cowx* v. *Foster* (1), *Ferrier* v. *Jay* (2), *Thornton* v. *Thornton* (3), and *Price* v. *Price*. (4) *In re Cotton* (5) is the strongest case in which, in recent times at all events, the contrary intention has been held to be sufficiently indicated.

In the present case the circumstances relied on as shewing an intention not to exercise the power are, first, that not one of the legatees is an object of the power; and, secondly, that all that is given to the husband is the residue of the testatrix's estate and effects. Still she does at the commencement of the will indicate an intention to exercise powers vested in her as well as dispose of her own estate, and by the use of the word "appoint" in addition to the words "give" and "bequeath" she seems to me to shew that this intention extended to what she describes as the residue of her estate and effects. On the whole, applying the rule stated as well as I can, I am of opinion that the power has been exercised.

Solicitors: *W. Stubbs, for Hirst & Capes, Harrogate; T. B. & W. Nelson.*

(1) 1 J. & H. 30.
(2) L. R. 10 Eq. 550.
(3) L. R. 20 Eq. 599.
(4) (1882) 46 L. T. 228.
(5) 40 Ch. D. 41, 44.

G. A. S.

HAYLES *v.* PEASE AND PARTNERS, LIMITED.

STIRLING J.

1898
Oct. 27, 28; Nov. 1, 2, 3.
1899
Feb. 4, 24.

[1896 H. 3674.]

Inclosure Act—Manorial Rights—Reservation of Mines—Working Powers.

Under an Inclosure Act, part of a common was allotted to the lord of the manor, in compensation for his right to the soil of the common, and the residue to the commoners; and the Act provided that nothing therein contained should prejudice the right of the lord to the royalties incident to the common, but that he and all persons claiming under him should at all times thereafter hold and enjoy the mines and other royalties "in as full ample and beneficial manner to all intents and purposes as he or they could or might have held and enjoyed the same in case this Act had not been made," provided always that in case the owner for the time being of the royalties, or any person claiming under him, should work any mines lying under any of the allotments, the person working the same should make reasonable satisfaction for the damage and spoil of the ground to the person for the time being in possession of such ground:—

Held, that the Act conferred on the owner for the time being of the mines, as incident to the enjoyment thereof, all usual working powers, which included the right of sinking shafts on any of the allotments for the purpose of winning and carrying away minerals under any part of the common.

Bell v. *Love*, (1883) 10 Q. B. D. 547; (1884) 9 App. Cas. 286, discussed.

THIS was a special case stated by the consent of the parties for the opinion of the Court under Order XXXIV., r. 1.

The plaintiffs were the owners of a piece of land allotted under a private Inclosure Act (4 Geo. 3, c. xlv.) to one William Campbell, in respect of an ancient freehold estate called Dicken House, the owners of which were entitled to a right of common over Crook and Billyrow Common, in the parish of Brancepeth, Durham. The defendants were lessees of the mines and minerals under the common, and were entitled to exercise the rights conferred by the Act on one Farrer Wren as the owner of the soil and inheritance of the common.

The preamble of the Act recited that there was within the village or township of Crook and Billyrow a moor or common containing by estimation 1500 acres of ground and upwards, and that Farrer Wren was the owner of the soil and inheritance

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and royalties of the common, which lay within and was part and parcel of the township of Crook and Billyrow.

By clause 1 (1) commissioners were appointed to divide and allot the common amongst Farrer Wren and the several persons entitled to right of common on the said common as therein directed.

By clause 3 the commissioners were directed to "set out, assign and allot unto the said Farrer Wren as a compensation for his right and interest in and to the soil of the said common, and his consent to the division and inclosure of the same, one full 16th part (quantity and quality considered) in one entire plot."

By clause 4 the residue was to be divided amongst the several persons having a right of common in proportion to the yearly rent or value of all their lands.

By clause 8 the commissioners were directed to set out "a part or parts of the common for a common quarry or common quarries," and for certain other purposes.

Clause 15 provided as follows: "that nothing in this Act contained shall prejudice, lessen, or defeat, the right, title, and interest of the said Farrer Wren, of, in, or to, the royalties incident or belonging to the said common of Crook and Billyrow aforesaid; but that the said Farrer Wren, his heirs and assigns, and all and every person and persons claiming under, or in trust for him or them, as owner or owners of the royalties of such common, and all succeeding owners thereof, for the time being, shall and may, at all times for ever hereafter, hold and enjoy all rents, perquisites, profits, mines, quarries, waifs, estrays, and other royalties and jurisdictions whatsoever, to the owner of the royalties of the said common, incident, appendant, and belonging or appertaining (other than such common quarries, liberty of digging clay, and right of common as could or might be claimed by him or them respectively, as owner or owners of the soil and inheritance of the said common or otherwise, in and upon the said common so to be inclosed as

(1) The clauses in the Act were not numbered in the original, but in the copy used by the Court they were numbered by agreement between the parties for convenience of reference.

aforesaid) in as full, ample, and beneficial manner, to all intents and purposes, as he or they could or might have held and enjoyed the same, in case this Act had not been made." Clause 16 provided, "that in case the said Farrer Wren, or the owner or owners, for the time being, of the royalties of the said vill, village, or township, or any person or persons claiming under him or them, shall, after such inclosure made as aforesaid, work any mine or mines lying within or under any of the said allotments or inclosures, then, and in such case, such person or persons so working the same, shall make reasonable satisfaction for the damage and spoil of ground occasioned thereby, to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil." Clause 17 empowered the owners and occupiers of the several allotments at all times thereafter to win and get stones and clay for bricks or tiles, or any other purpose, within their respect ve allotments, and also to get stones within the said common quarries to be set out as before mentioned for the use of their said allotments, and also of their several ancient inclosures, and to be entitled to all woods, underwoods, and trees which should afterwards be planted or grow upon their respective allotments.

The 6th paragraph of the case stated that, by an agreement dated February 12, 1881, and made between the plaintiffs of the one part and the defendants of the other part, the plaintiffs agreed to lease the coal under the Dicken House ancient freehold, together with full power and authority for the defendants to use the surface of the said allotment for winning, working, or leading away either the Dicken House minerals, or the minerals out of any other adjoining royalty. The term and interest given and the powers created by the said agreement were surrendered to the plaintiffs by the defendants on May 13, 1896.

The 7th paragraph stated that the defendants or their predecessors in title at different times had sunk on the said allotment two pits or shafts, now known as Sunnyside Pit and a subsidiary pit or air-shaft, and had erected on the said allotment engine-houses, engines, shops, a reservoir, and other works for winning and working coal.

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The 9th paragraph stated that since May 13, 1896, the date of the surrender of the agreement referred to in paragraph 6, the defendants had been altering their arrangements at the Sunnyside Pit with a view to the future working of coal underlying other parts of the said common not being a part of the said allotment, and that they claimed by virtue of the provisions of the said Inclosure Act the right to go upon the surface of the said allotment at all times for all purposes incidental to the using of and to use the said pits or shafts and works on the surface of the said allotment to win, work, and carry away coal and other minerals lying and being under and within the said allotment, and also lying and being under and within other parts of the said common.

The first question for the opinion of the Court was whether the defendants were entitled under the provisions of the said Inclosure Act to use the surface of the said allotment and the said works thereon for any, and, if so, which, of the purposes specified in paragraph 9. And the special case (by clauses 2 and 3) authorized the Court, if it should be of opinion that the defendants were not entitled to use the surface of the said allotment for any or some of these purposes, to grant an injunction and to award damages to the plaintiffs, and also to deal with the costs of the case as the Court might think fit.

The special case was in terms confined to existing works, and said nothing as to the right to sink additional pits, or the right of making spoil banks upon any parts of the property; but it was admitted at the bar that the defendants intended to sink additional pits, and they were willing that the opinion of the Court should be taken as to that right; but they did not consent to any amendment of the case, or to giving the Court power to decide any question as to the right to deposit the spoil.

Upjohn, Q.C., and *H. F. Manisty*, for the plaintiffs. This case is governed by *Bell* v. *Love* (1), which is a decision upon an Inclosure Act framed in very similar terms to the present Act, and is distinguishable from *Duke of Buccleuch* v.

(1) 10 Q. B. D. 547; 9 App. Cas. 286.

Wakefield (1), where very much larger rights were reserved to the lord.

The decision in the House of Lords in *Bell* v. *Love* (2) applies to destruction done on the surface as well as to destruction done under the surface. That decision shews that where there has been an allotment under an Inclosure Act to the former commoners the allottees are entitled to enjoy the surface notwithstanding the reservation to the lord of the minerals, and we say that it is immaterial how the destruction of the surface is effected. It proceeds on the principle "Sic utere tuo ut alienum non lædas." Under this Act there is one measure of damages for spoil of surface which is to be paid to the occupier for the time being. It is clear that the Legislature was there contemplating damage and spoil of ground of a temporary character; it was not contemplating destruction to the value of the fee simple, for which compensation to the occupier would not be adequate. In the absence of clear words, the Legislature will not be presumed to intend to confiscate one man's property for the benefit of another without providing for his compensation: *London and North Western Ry. Co.* v. *Evans* (3), per Bowen L.J.; *Bradford Corporation* v. *Pickles.* (4) The result of the authorities is this—that where the ownership of the minerals and of the surface is severed, the primâ facie inference is that the owner of the surface shall enjoy the surface allotted to him; and it lies on the owner of the minerals to shew by clear words that he has the right to destroy the surface. This inference is strengthened by the absence of any provision for compensation, and is not rebutted by the presence of a limited compensation clause: *Bell* v. *Earl of Dudley* (5), per Chitty J. We say here that the lord is not entitled to do anything inconsistent with the freehold tenure of the allotment; his right is limited to acts not substantially interfering with the surface rights of the allottees. The nature of the lord's right is discussed in *Ramsay* v.

(1) (1870) L. R. 4 H. L. 377.
(2) 9 App. Cas. 286.
(3) [1893] 1 Ch. 16, 28.
(4) [1894] 3 Ch. 53, 67; [1895] 1 Ch. 145, 152; [1895] A. C. 587, 594, 596, 602.
(5) [1895] 1 Ch. 182, 186.

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Blair (1), and the better view is that it is a privilege, servitude, or easement over the land of the allottees: see *Dand* v. *Kingscote*. (2) But an easement can be created only by express words of grant or of necessity, and apart from necessity, such as would arise for example in the case of a fault, a mere reservation of mines gives no rights at all over the surface: *Harris* v. *Ryding*. (3) Here the defendants do not claim to sink pits, &c., as a right of necessity, but they claim by virtue of the provisions of the Act of Parliament. There must, therefore, be found in the Act an express reservation, or, to speak accurately, an express grant—*Durham and Sunderland Ry. Co.* v. *Walker* (4)—of working rights over the surface of the lands allotted to the commoners; *Wheeldon* v. *Burrows* (5); but there is here nothing more than a reservation of the ownership of the mines, and it is important to notice that under this Act an allotment has been made to the lord, and that the mines could be worked from his allotment. *Midgley* v. *Richardson* (6) is distinguishable from this case, because there the language of the Act reserving the lord's rights was much more comprehensive, and the Court attached importance to the fact that there was not there any provision for making an allotment to the lord. The compensation clause (clause 16) cannot be relied on to enlarge the scope of the Act—in *Bell* v. *Love* (7) it was used to restrict its operation—and we suggest that it was inserted to provide for the contingency of the lord being compelled by necessity to work the mines from the other allotments. The right now claimed by the defendants does not fall within the reasonable scope of the Act.

Assuming the right to sink pits to exist, it must be limited to winning the coal under the allotment in which the pit is sunk.

Grosvenor Woods, *Q.C.*, and *W. A. Meek*, for the defendants. It is said, first, that this Act ought to be construed in such a way as to preserve the full enjoyment of the surface to the allottees; and, secondly, that it ought to be construed by the

(1) (1876) 1 App. Cas. 701.
(2) (1840) 6 M. & W. 174.
(3) (1839) 5 M. & W. 60, 66.
(4) (1842) 2 Q. B. 940, 967.
(5) (1879) 12 Ch. D. 31, 49.
(6) (1845) 14 M. & W. 595, 605.
(7) 9 App. Cas. 286.

light of another Act passed fifteen years later. We demur to both those propositions, and we say that regard must be had to the circumstances existing at the time when the Act was passed: *Hawkins* v. *Gathercole* (1), cited with approval in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents*. (2) It is a recognised principle of construction that statutes will be so construed as not to encroach on the rights of the subject: Maxwell on Interpretation of Statutes, 3rd ed. p. 399. Another principle of construction is that stated by Bowen L.J. in *London and North Western Ry. Co.* v. *Evans* (3), already referred to by the plaintiffs. Applying those two principles to the present case, we submit that the right of working the mines was reserved to the mine owner over the whole of the lands, and that the contrary proposition would be practically confiscating his right to the mines without paying him any compensation. This was a mining county, and the object of the Act was not to interfere with the mineral rights theretofore existing, except that the mine owner would no longer have the right to let down the surface, as he would have had before the passing of the Act, provided he left sufficient for the commoners. The Act operates as a parliamentary conveyance of the surface, reserving to the former owner of the surface and minerals the full enjoyment of the minerals (other than the excepted quarries) with the power of working them, making reasonable compensation to the occupier for the time being for damage to the soil. It is a necessary implication from the language of the Act that as the mines were reserved as fully as before, so the power of working them was reserved. There is nothing in the Act to warrant the supposition that because there are twenty or thirty allotments the mine owner is bound to sink a like number of shafts; on the contrary, the Act shews that the owner's right is not against any particular allottee, but against the allottees generally. The power of working implied by this Act means a power of working in any reasonable way so as to enjoy the mines: *Pretty* v. *Solly* (4); *Micklethwait* v. *Winter* (5);

(1) (1855) 6 D. M. & G. 1, 21.
(2) [1898] A. C. 571, 575.
(3) [1893] 1 Ch. 16, 28.
(4) (1859) 26 Beav. 606.
(5) (1851) 6 Ex. 644.

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Eardley v. *Granville* (1); *Earl of Jersey* v. *Neath Poor Law Guardians* (2); *Earl of Cardigan* v. *Armitage* (3); *Rogers* v. *Taylor* (4); *Attorney-General* v. *Welsh Granite Co.* (5). The compensation clause is framed in general language, and there is nothing to limit the satisfaction to be obtained under it except the word "reasonable": *Darley Main Colliery Co.* v. *Mitchell.* (6) *Bell* v. *Love* (7) shews that a mine owner who has granted away the surface has no right to let it down, inasmuch as he must not take away the "res" which he has granted, the surface being regarded as an entity: *Richards* v. *Jenkins* (8); but that is a doctrine per se. Here there is no destruction of the "res" itself. There is a distinction between letting down the surface and any amount of alteration of it by erecting buildings, or even by sinking shafts upon it.

Upjohn, Q.C., in reply.

Cur. adv. vult.

Feb. 4. STIRLING J., after referring to the special case and to the Inclosure Act, and stating that he proposed to deal with the question of the defendants' right to sink pits, but not with the question of their right to deposit spoil, continued as follows:— The question arises as to the effect to be given to the words of the 15th section of the Inclosure Act.

I may first notice a contention on behalf of the plaintiffs which was placed before me in a short and very forcible argument by Mr. Manisty—that s. 15 operates as a mere reservation of the ownership without any grant of working rights, and that in consequence no working rights belonged to those in whose favour the reservation was made except such as were necessary in a legal sense for the enjoyment of the mines. He pointed out that an award had been made of a considerable portion of the common to the lord of the manor, and that no case of necessity had been made out; and as to clause 16, he contended that its object was to compel the owner of the

(1) (1876) 3 Ch. D. 826, 834.
(2) (1889) 22 Q. B. D. 555, 558.
(3) (1823) 2 B. & C. 197, 207.
(4) (1857) 1 H. & N. 706.
(5) (1887) 35 W. R. 617.
(6) (1886) 11 App. Cas. 127.
(7) 10 Q. B. D. 547; 9 App. Cas. 286.
(8) (1868) 17 W. R. 30.

minerals to make compensation in case such rights of necessity existed.

In my opinion this contention is not well founded. It appears to me to give too little effect to the strong words at the close of clause 15, and to be contrary to the opinion expressed, at all events by the majority of the learned judges who had to consider the case of *Bell* v. *Love* (1), to which I shall presently refer. As regards clause 16, it is to be remarked that it is unusual in Acts of Parliament of this description to provide compensation for the exercise of common law rights such as rights of necessity would be; and on that I desire to refer to the observations to that effect of Lord Esher, the late Master of the Rolls, in the case of *Attorney-General* v. *Welsh Granite Co.* (2)

The main contention, however, on the part of the plaintiffs was that the words of clause 15 were not sufficient on their true construction to confer on the defendants the rights claimed by them. Reference was made on both sides at very considerable length to the opinions expressed by the various judges before whom came the case of *Bell* v. *Love*. (1) In that case the point to be decided was whether under somewhat similar words in another Inclosure Act the owner of the minerals was entitled to work so as to let down the surface. The effect of the clause was very much considered by all the judges who dealt with that case, and I do not propose to read much of what was said, but I think it is desirable I should refer to a few passages in each of the judgments which were given. In that case the Inclosure Act provided that the Dean and Chapter of Durham, who were the owners of the soil of the common inclosed, and their successors, might thereafter enjoy, amongst certain other things, all mines "in as full, ample, and beneficial manner to all intents and purposes as they could or might have enjoyed the same in case this Act had not been made." Then it was provided that in case the Dean and Chapter or their successors should make use of or work any mines, such persons so working the mines should make satisfaction for the damages and

(1) 10 Q. B. D. 547; 9 App. Cas. 286. (2) 35 W. R. 617.

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spoil of ground occasioned thereby to the person or persons in possession of such ground, and such satisfaction was to be subject to the limitation that it was not to exceed 5*l.* yearly during the time of the working of such mine; so that a limit was placed upon the amount of compensation in that case which does not exist in the present case, and that is referred to by some of the learned judges. Baggallay L.J., in stating the conclusion at which he had arrived as to the rights of the parties, says this (1): "Upon the whole, I have come to the conclusion that the rights reserved by this proviso to the Dean and Chapter, or other the owners for the time being of the royalties of the manor, are the fullest and most ample rights of getting the minerals underlying the several allotments of portions of the moor which are consistent with the tenure by which such allotments are held; but that such rights do not extend to authorize them, in getting such minerals, to disturb or let down the surface of freehold allotments." The present Master of the Rolls (then Lindley L.J.) says (2): "Construing the statute by the light of former decisions, I am of opinion that the short legal effect of the Act is to convert the commoners into owners of the surface, subject to such rights of interference as are clearly reserved to or conferred by the Act upon the lords of the manor. On the other hand, the Act reserves to the lords the mines and the right to hold and enjoy them as owners, but with no additional rights except such as are clearly reserved or conferred by the Act itself, and I cannot find any right to let down the surface reserved or conferred in sufficiently clear language to justify the lords in so working their mines as to let the surface down." In the House of Lords, Lord Selborne says this (3): "What is there in that clause of reservation which can possibly be relied on as depriving the freeholder to whom an allotment has been made of the right of support to his freehold? The only words which have been insisted upon as capable of having that effect are the words, 'in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the

(1) 10 Q. B. D. 566. (2) 10 Q. B. D. 570.
(3) 9 App. Cas. 291.

same' (which means, as I understand it, held and enjoyed those rights, titles, and interests which are reserved) 'if this Act had not been made.' Applying that to the mines, although it is not more applicable to the mines than to any other subject, I quite agree that it at least carries so much as this, that they were with the mines to have all usual powers and surface privileges for working them. Supposing in the clause of reservation these words had been expressly inserted, 'reserving the mines and minerals with all usual powers and surface privileges for working them,' would that have given a right to let down the surface? Would that have destroyed the freeholder's right of support? I apprehend that it clearly would not." Later on his Lordship says (1): "I quite agree with what Baggallay L.J. in the Court of Appeal suggested on that subject; namely, that the substituted rights are not given with power to the lord to take them away, which he could not have done with regard to the original rights, and that this reservation, if it stood alone, must be construed subject to the surface rights of the person to whom the allotments had been made." Then his Lordship discusses the proviso for compensation, and as to that he says (2): "It is contended, however, that the usual powers of working mines do involve some right of interference with the surface; and that is contemplated by this proviso. But why should more be supposed to be contemplated? What word is there which shews more than this, that it is contemplated, that in the working of mines, as well as in the use of way leaves, there may be some interference with the surface, in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working. Why, therefore, should it be supposed to follow, because the effects on the surface which are contemplated are provided for by way of compensation? The whole proviso, in my opinion, is satisfied by ordinary surface damage, such as might arise from the exercise of usual working powers." Lord Watson points out (3)

(1) 9 App. Cas. 292. (2) 9 App. Cas. 293.
(3) 9 App. Cas. 298–9.

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that "No compensation is provided to the owner of the surface, who is not in the personal occupation of it, during the time of working, though his property may be permanently injured; and, even if he does occupy himself, he is not to be compensated for any damage accruing (as for instance from subsidence) after the workings have ceased." Then a little further on he says: "I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumably the intention of such a clause, to define or extend the powers given to the mine owner; and it is frequently ob majorem cautelam, and in the interest of the landowner, expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface. The clause may, nevertheless, be so expressed as to explain the character and extent of these powers, as was the case in *Aspden* v. *Seddon* (1), where the power reserved to the mine owner was to work the subjacent minerals without entering upon the surface of the lands." Then, lastly, Lord Bramwell said (2) with reference to the reserving of the mines to the Dean and Chapter: "It is clear to me that that does not relate to working, but to property. The section begins that the title of the Dean and Chapter to the royalties incident or belonging to the manor shall not be prejudiced, lessened, or defeated by anything in the Act, '*but that*' they as owners of the royalties shall hold and enjoy all rents, mines, &c., to the owners of the manor incident, belonging, or appertaining. This relates to property. The power of working, so far as given, is in the next section." Then dealing later on with the following section—that is the compensation clause—his Lordship says this: "I am of opinion, however, that the damage contemplated is temporary only, a damage to the person in possession, not to any reversioner or remainderman. The statute uses the present participles 'working,' 'laying,' 'making,' 'using,' and says that satisfaction shall be made for the '*damage*' and '*spoil of ground*' occasioned

(1) (1875) L. R. 10 Ch. 394. (2) 9 App. Cas. 300.

thereby to the person in possession at the *times* of such damage and spoil, and the damage is to be paid yearly *during the time of working* or continuing or using such ways for every acre so damaged. This I think clearly contemplates temporary damage during the working from which the person in possession alone suffers." Then his Lordship points out there was no provision for subsidence. Then he refers to an argument which had been used by the Solicitor-General in the following terms: "He," i.e., the Solicitor-General, "says, if the argument for the respondents is right, inasmuch as the damage from a spoil bank or a shaft is permanent, either there is no right to sink a shaft or make a spoil bank, or the Legislature has thought that compensation to the person in possession was enough, and, if so, why is not the same true of subsidence, it being always the surface which is injured? This is a strong argument. It is singular that no express power is given to sink shafts or deposit spoil. Whether this matter was not thought of, or the right was supposed to be 'incident' to the manor, or it was thought that damage to the reversion from shafts and spoil was not of sufficient consequence to the reversioner to require compensation to be provided, I cannot guess. Perhaps there is no right to sink shafts and deposit spoil. I think there is. But it does not seem to me that because no provision is made for compensation to the reversioner for one permanent damage there is therefore a right to inflict on him another one, which may damage him only, and not the person in possession during the working."

Now, the views of the authorities to which I have referred are not perhaps altogether in accord; but it appears to me that the weight of authority is in favour of the view that clauses such as those with which I am dealing were meant to confer on the owner of the mines, as an incident to the enjoyment of them, some powers of working the minerals, though the extent of those powers is left very far from being completely defined. It was urged before me that those powers ought not to be extended to anything which would operate as a destruction of the surface or the permanent exclusion of the owner from it, and it was pointed out that clause 16 gives no compensation to

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the owner of the surface, but only to the person or persons for the time being in possession of the ground. It was, therefore, contended that these powers ought not to be held to include the power of sinking a pit for the purpose of winning the minerals. If so, the rights conferred on the owner of the mines would amount to little more than rights of way over the surface or rights of a similar kind. I cannot think that the construction is so limited. I think that the enjoyment spoken of in clause 15 is not meant to be a mere barren ownership of the minerals in the bowels of the earth, but includes the winning, carrying away, and disposing of them. I think the power to sink pits must be included in the "usual powers and surface privileges for working" spoken of by Lord Selborne in advising the House of Lords. Lord Bramwell expressly states his opinion to be, though not free from doubt, that under the Act in question a right to sink shafts was intended.

The omission of the Legislature to provide complete compensation for damage caused by sinking pits has not been considered a sufficient ground for holding that the right does not exist in other cases, as, for example, in *Goold* v. *Great Western Deep Coal Co.* (1) After all, it is to be borne in mind that the diameter of a pit is only a few feet at most, and that the amount of soil carried away in constructing it may not necessarily be very large or very important, and that after the pit has ceased to be used it may be either filled up or arched over, and the surface restored so that it can be enjoyed by the surface owner.

In my opinion, therefore, the Legislature has conferred on the mine owners all such powers as would be reasonably sufficient to enable them to dig and carry away the minerals; and it follows that the owners are entitled to sink pits and a fortiori to use existing pits. It appears to me also to follow that they are entitled to fix to the surface such machinery as may be reasonably sufficient to drain the mines and to draw the minerals to the surface, and to erect such buildings as may be reasonable for the protection and effectual working of such machinery.

(1) (1865) 2 D. J. & S. 600, 608.

But the case asks the opinion of the Court whether the defendants are entitled to use certain existing works which include "engine-houses, engines, shops, and other works for winning and working coal." These works were, as I read the special case, erected by the defendants while they were tenants of the plaintiffs under the agreement of February 12, 1881. That agreement has now come to an end, and the works in question being affixed to the soil have become and are, as I understand, the property of the plaintiffs.

Now the decision in *Bell* v. *Love* (1) was that the mine owner was not entitled to work his mines so as to destroy or cause damage to the buildings erected on the surface. Still less, then, would he be entitled to destroy or damage such buildings in the exercise of the working privileges conferred on him by the Act. He could not, for example, pull down a house in order to sink a pit, nor could he take and use for the purpose of working the minerals existing buildings or fixed machinery belonging to another person. I am not aware of any case in which such a proposition has been laid down. Such a power would not be usual, and could only, I think, be conferred by express words. I cannot see that it makes any difference in point of law that the buildings and machinery were originally erected by the mine owner under a different right if they had in fact ceased to be his property.

In my opinion the first question ought to be answered as follows: The defendants are entitled to use the surface of the allotment in the special case mentioned for the purpose of sinking and to sink pits or shafts thereon, and for all purposes incidental to the using, and to use such pits or shafts when sunk, and also the existing pits or shafts, to win, work, and carry away coal and other minerals lying and being under and within the allotment in the special case mentioned, and also lying and being under and within other parts of the common, and to take water from the reservoir in the special case mentioned for the purpose of such winning and working, but not to use any of the engine-houses, engines, or shops in the special case mentioned being the property of the plaintiffs.

(1) 10 Q. B. D. 547; 9 App. Cas. 286.

STIRLING J. It follows from that that there ought to be an injunction as regards the user of the engine-houses, engines, and shops; and as regards the costs, I think each party ought to bear his own.

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HAYLES v. PEASE AND PARTNERS, LIMITED.

Feb. 24. This case again came before the Court upon an application on behalf of the defendants to vary the judgment, so far as it related to the engine-houses, engines, and shops, on the ground that the Court had proceeded upon the erroneous assumption that these works had been erected by the defendants during the subsistence of the agreement of February 12, 1881. It had since been discovered, and was now admitted, that they were in fact erected prior to the date of that agreement, and the present application was made in consequence of that discovery.

STIRLING J. acceded to the application, and varied the judgment (which had not yet been drawn up) by declaring that the defendants were entitled to use the engine-houses, engines, and shops for the purposes specified in the special case, and he dissolved the injunction which he had previously granted.

Solicitors: *King, Wigg & Co., for J. & R. D. Proud, Bishop Auckland; Howe & Rake, for Lucas, Hutchinson & Meek, Darlington.*

H. B. H.

ROBERTS *v.* GWYRFAI DISTRICT COUNCIL.

KEKEWICH J.

1899

Jan. 25, 26.

[1898 R. 586.]

Riparian Owner—Stream—Interruption—Alteration—Local Authority—"Injuriously affecting"—Consent of Riparian Owner—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 332.

Where a riparian owner has a common law right to the uninterrupted flow of a stream past his tenement, the local authority, in interrupting or altering the flow for the purpose of providing a water supply for their district under the Public Health Act, 1875, are "injuriously affecting" the stream within s. 332, which they are not entitled to do unless they have first obtained the written consent of the riparian owner under that section, the local authority having no compulsory powers under that Act to interfere with or alter the flow of the stream, and the common law right of the riparian owner being unaffected by the Act. He is therefore entitled to bring an action to maintain his right, even though the act of the local authority may cause him no sensible damage.

Swindon Waterworks Co. v. *Wilts and Berks Canal Navigation Co.*, (1875) L. R. 7 H. L. 697, considered.

THE plaintiff was the owner and occupier of an ancient water-mill, with lands belonging thereto, known as Brynygro Mill, in the parish of Llanllyfni in the county of Carnarvon, and he claimed as riparian owner and occupier of the same to be entitled to the natural flow of a stream that ran past his mill from a lake called Llyn Cwmdulyn situate at the foot of a mountain some distance above the mill, the stream being utilized for driving the mill. The plaintiff also claimed that, whenever necessary for the purposes of his mill, he was entitled, in times of drought and scarcity of water in the stream, to dam up the water of the lake as a reservoir so as to ensure a sufficient supply of water to the mill.

In May, 1893, the defendants, who had obtained a lease of the lake from the Crown and also a lease of adjoining land for the purpose of increasing the size of the lake, informed the plaintiff of their intention to take water from the lake for the purpose of supplying certain villages in their district with water, and applied to him for his written consent thereto under s. 332

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of the Public Health Act, 1875 (38 & 39 Vict. c. 55), but he refused to give such consent. Thereupon the defendants, without any further notice, laid down pipes, and under, it was said, a licence granted by the Crown in 1896, constructed a dam across the end of the lake—of which the stream in question formed the natural outlet—so as to increase the water storage, a sluice being placed in the dam to regulate the outflow from the lake. The area of the lake was considerably increased by the defendants' works.

The plaintiff then, on March 30, 1898, issued the writ in this action for an injunction to restrain the defendants, their servants and agents, from taking any of the water from the lake, and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished.

The defendants, as lessees and occupiers of land adjoining the lake, claimed riparian and other rights in the lake, including the right to take water therefrom for supplying their district, so far as they could do so without causing damage to other riparian owners. They denied that they had done or were intending to do anything whereby the flow of water in the stream past the plaintiff's mill had been or would be diminished or so as to cause any damage to the plaintiff.

The action now came on for trial with witnesses. It was admitted at the trial that the plaintiff had not yet suffered any actual damage, and that the defendants' dam had been properly constructed for the purpose they had in view; also, that an arrangement had been made by means of the sluice for providing a regulated flow of water down the stream. This, the defendants' witnesses said, would give the plaintiff a constant supply instead of an intermittent one, which the plaintiff admitted sometimes occurred in dry seasons. The plaintiff, however, insisted that he was entitled, as of right, to the flow of water past his mill unimpeded and uncontrolled in any way by the defendants.

It was admitted by the defendants' witnesses that the supply of the district would cause the abstraction of about one-sixteenth of the water in the lake.

Warrington, Q.C., and *Bryn Roberts*, for the plaintiff. First, as a riparian proprietor, the plaintiff is entitled to have the stream allowed to flow in its natural state, neither increased nor diminished, subject only to the rights of other riparian owners. Secondly, the plaintiff is also entitled to restrain the improper use of the lake or stream by an upper riparian owner, without shewing actual damage, provided that use interferes with the plaintiff's right. Thirdly, the sale of the water by the district council as riparian proprietors is an improper use of water by a riparian proprietor. And, fourthly, in addition to his right as a riparian proprietor, the plaintiff has a prescriptive right to control, at his own convenience, the flow of water by his mill.

[KEKEWICH J. What is it that you precisely claim as a prescription?]

To place at our own will and pleasure, and for our convenience, stones and other materials for damming up the lake so as to store the water, when necessary, and regulate its flow for working the mill, and to go on the land for that purpose. The defendants' dam prevents our doing this and gives the right to control the flow to the defendants to the injury of our prescriptive right. Actual damage is not indispensable as the foundation of an action by a riparian owner: it is sufficient to shew the violation of his right. The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property through which it passes: *Embrey* v. *Owen*. (1) It is only for an unreasonable use of the water that an action will lie. (1) If what the defendants are doing is allowed to continue it will become a reasonable use, and will after twenty years confer a legal right. The defendants are only entitled to use the water of the lake as riparian proprietors; and the supply of a district is not a purpose for which a riparian proprietor is entitled to divert water from a lake or stream to the injury of the riparian proprietors below him: *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (2)

(1) (1851) 6 Ex. 353, 367–9.

(2) L. R. 7 H. L. 697, 702, 705–6; (1874) L. R. 9 Ch. 451, 457, et seq.

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Again, the Public Health Act, 1875 (38 & 39 Vict. c. 55), gives no right to a local authority to take water for the supply of their district except by contract: s. 51; and notice in writing is to be served upon any person who will be affected by the proposed works: s. 53. Here there has been neither contract nor notice: nor have the defendants any compulsory powers. Then s. 332 says, "Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir canal river or stream or the feeders thereof or the supply quality or fall of water contained in any reservoir canal river stream or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir canal river stream feeders or such supply quality or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." Here no consent has been given by the plaintiff to the defendants' interference with his right as a riparian proprietor, and therefore they have no statutory authority to do that which will interfere with his legal right.

Renshaw, *Q.C.*, and *A. Glen*, for the defendants. This is a quia timet action, and in such an action the plaintiff must shew a strong case of probability that the apprehended mischief will in fact arise: *Attorney-General* v. *Manchester Corporation*. (1) Here no such case is made out. The observations of Lord Cairns in the *Swindon Waterworks Case* (2) are against the plaintiff's contention, for he has suffered no sensible damage. We admit this is a natural stream, but we say we are entitled by statute to do what we are doing. There is no reported authority upon the meaning of the words "injuriously affect" in s. 332 of the Public Health Act, 1875; but they appear to refer to some illegal act constituting an injury which would give the plaintiff a right of action—doing some injury which caused damage to another person. There can be no right of action unless the defendants are doing something which they are not entitled by law to do, or are doing damage. If the defendants were constructing their works regardless of damage

(1) [1893] 2 Ch. 87, 91-2. (2) L. R. 7 H. L. 705.

to the plaintiff, then he might come for damages; but that is not the case here.

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[KEKEWICH J. The numerous authorities on the meaning of "injuriously affecting" in s. 68 of the Lands Clauses Consolidation Act, 1845, do not seem applicable to the present case, for there the words are "injuriously affecting lands or any interest therein," whereas in s. 332 of the Public Health Act, 1875, the words are "injuriously affect any reservoir, canal, river or stream."]

No; the language of the two sections differs. It is said that we are doing an illegal act in using the water of the lake for supplying our district, that is, for trade purposes; but in *Earl of Sandwich* v. *Great Northern Ry. Co.* (1) it was held that a railway company who were riparian owners were entitled as such to take as much water as they liked from the stream near their station for the purposes of carrying on their trade, provided they did not injure the riparian owners below and their use of the water was reasonable.

Bryn Roberts, in reply.

[KEKEWICH J. I will only call upon you to reply upon the construction of the Public Health Act, 1875.]

The Act is simply an enabling Act—an Act to enable district councils to do what they could not do before, that is, to supply districts with water and to levy and apply rates for that purpose, but not to seize other people's property. Before they can take any property for the purpose they are required, by s. 332, to obtain the prior consent in writing of the owner. There is nothing in the Act conferring on these councils compulsory powers. In *Reg.* v. *Darlington Local Board of Health* (2), which was a case upon s. 73 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), a section substantially the same as s. 332 of the Act of 1875, it was held that the abstraction by the defendants of water from a river so that the prosecutor's mill was stopped for want of water was an act "injuriously affecting" the river within the meaning of the section.

With regard to s. 68 of the Lands Clauses Acts, if we are

(1) (1878) 10 Ch. D. 707. (2) (1865) 35 L. J. (Q.B.) 45.

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driven to rely upon it, we are within the section because we have an "interest in land" which is "injuriously affected," quite apart from any pecuniary damage. As Jessel M.R. said in *Cooper* v. *Crabtree* (1), there are cases in which there may be enormous injury to property, though the actual damage caused by the particular act complained of may be trifling. The defendants say that they will send us down sufficient water for our purposes, but we ought not to be dependent upon their good will or be left at their mercy. We have our legal rights upon which we are entitled to rely. It is conceded that one-sixteenth of the water in the lake will be required for the water supply of the district: that is an admission that there will be a sensible diminution of water.

Renshaw, Q.C. As to *Reg.* v. *Darlington Local Board of Health* (2), the defendants took away the whole water supply for two days, so that the prosecutor's mill would not work. That was, of course, "injuriously affecting." That case has no application here.

KEKEWICH J. held that, so far as the plaintiff's claim was founded upon the ground of prescription, it failed; and that, therefore, so far as the costs had been increased by that claim the plaintiff must pay those costs, whatever might be the result of the case generally, such costs to be taxed as between solicitor and client. His Lordship then proceeded:—

With regard to the rest of the case, it raises an entirely different question. The defendants, in the exercise of what they conceive to be their duty and within their powers, utilised the waters of this lake by constructing certain works which are admitted at present to be properly constructed with a view of supplying the district with water. It is not suggested that the plaintiff will be any worse off now than he was before: probably he will be better off in the future than he has been in the past. The supply may not be the same, but it will be sufficient, and will be apparently more constant than it has been before, since the evidence shews it to have been of an intermittent character and sometimes very much less than was

(1) (1882) 20 Ch. D. 589. (2) 35 L. J. (Q.B.) 45.

required for the purposes of the mill. But the plaintiff says, "I am entitled to insist upon having what I had before. It is immaterial whether the supply of water I had before is better or worse than what is now proposed to be given to me. It is for me to consider whether I shall derive any benefit from the alteration. I protest against any alteration at all." Several cases have been referred to, but I intend to refer only to one of them in which occurs a passage to which Mr. Renshaw called my attention. The law on this subject has been threshed out again and again, and I do not think any advantage would be gained by my going through the authorities. A riparian proprietor or owner is entitled to say that the water which flows by his property and which is used by him for ordinary, or it may be for extraordinary, purposes shall flow in the future as it has done in the past—debet currere ut currere solebat. That seems to me to be the common law right; and unless that common law right has been affected by statute he is entitled to insist upon it. But there is one passage in Lord Cairns's speech in the House of Lords in the case of *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1) which, Mr. Renshaw says, instead of being in the plaintiff's favour is against him. I do not so read it. What Lord Cairns says is this (2): "Therefore, my Lords, so far as regards the position of the respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the appellants, if what is so done by them is insisted upon as a thing which they have a right to do." That is the qualification. "I put this qualification, because, if, when the attention of the appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the Court of Chancery found . . . . that no sensible damage had occurred to them, it might not have thought it necessary to interfere with them by an injunction or declaration."

What I understand Lord Cairns to mean is that, there being no sensible damage, an injunction or declaration would not have been granted unless the appellants had insisted upon what

(1) L. R. 7 H. L. 697. (2) L. R. 7 H. L. 705.

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they were doing as a thing they were entitled to do as a matter of right. From which I should conclude also that, as they did insist upon it as a matter of right, whether damage was incurred or not, the respondents were entitled to an injunction or declaration. That, as I understand, is the meaning of his Lordship's observations, and what he means by the qualification, and what he deduces from it. Therefore it seems to me that, unless the defendants have some higher authority by statute (prescription being out of the question) to interfere with the flow of water, they have no right to alter the flow even although the alteration may cause no sensible damage to the plaintiff. He is entitled to have his water flowing as it did before, and so far I am entirely in his favour.

But then it is said that the defendants have a right to interfere under the Public Health Act, 1875. That claim is based entirely upon the 332nd section. It has been pointed out by Mr. Bryn Roberts that that section does not enable the local authority to do anything of the kind at all: that all it says is that the other parts of the Act shall not authorize or enable them to do the things mentioned in this section without the consent in writing of the persons there described. That seems to me to be an extremely pertinent observation. But what are they not authorized to do? Sect. 332 provides that "Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir canal river or stream or the feeders thereof or the supply quality or fall of water contained in any reservoir canal river stream or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir canal river stream feeders or such supply quality or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." Adopting Mr. Bryn Roberts' argument on that section, I say that does not enable the defendants to "injuriously affect" the stream that passes the plaintiff's mill. It only says that they shall not be allowed to do it without the written consent of the person who has the right to complain. As to what is

the exact meaning of "injuriously affect" there may be some difficulty in deciding. My attention has been called to the Local Government Act of 1858 (21 & 22 Vict. c. 98), which contains a similar section, namely, s. 73; but I go back to the Lands Clauses Consolidation Act, 1845, where the words are to be found in s. 68, and there is a very large body of authorities relating to them. In that Act the distinction is taken quite clearly, and in a number of authorities the distinction is drawn between "taking" lands and "injuriously affecting" lands, or any interest therein. The words of s. 68 are: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works," and so on.

The "taking" of lands and the "injuriously affecting" them are two different things. Compensation in respect of either can only be awarded because the Act legalizes what otherwise would not be legal; and therefore, as a result, the amount has to be found by a jury or by an arbitrator. When land is taken compulsorily the case is more properly called one of "purchase"; when land is not taken but is injuriously affected it is more naturally called one of "compensation." The Lands Clauses Consolidation Act only provides for compensation for injuriously affecting lands; and although a man might make a claim on the ground that his land was injuriously affected, he would get no compensation unless he proved actual injury, and so far it is difficult to apply that Act to a case of this sort, where there is no injury that can be assessed in pounds, shillings and pence.

It appears to me, therefore, that one must not too strictly apply the provisions of the authorities relating to the Lands Clauses Consolidation Act, 1845, and, moreover, we have two entirely different things. In s. 332 of the Public Health Act, 1875, the words are, "injuriously affect any reservoir, canal, river, stream or the feeders thereof, or the supply, quality or fall of water," and so on. That is quite different from injuriously affecting lands; and the cases on "injuriously affecting lands" are, I think, irrelevant in a great measure to a case of injuriously affecting any reservoir, &c., or the supply, quality or fall of

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water. If the local authority interfere with the supply of water in such a way that any person or body of persons may be entitled by law to prevent it, that is "injuriously affecting" the supply, and this they cannot do unless allowed by the general law of this country.

I have already expressed my opinion that the plaintiff is entitled to be relieved from any alteration in the supply of water. If that be so, then the Public Health Act, 1875, comes in and says that there is nothing in it which will enable the defendants to do that without the consent of the plaintiff, which consent is not forthcoming. On that ground, so far from the defendants being under the protection of the Act, the Act saves the plaintiff's rights.

Beyond that again there is the other point, which has been raised by the plaintiff's counsel, that there is no power under the Act to do the thing the defendants are doing. The defendants are seeking to interfere with the plaintiff's common law right, and there is no statutory power enabling them to do that. The common law right seems to me to be unaffected by the statute.

The result is that, in my opinion, the plaintiff is entitled to an injunction, and to the costs of the action as between party and party, the defendants to have their costs, as between solicitor and client, on the question of prescription. The two sets of costs will be set off one against the other. The injunction will be a perpetual injunction to restrain the defendants, their servants, agents, and workmen, from taking any water from the lake for the purpose of supplying their district with water, and from doing any other act for that purpose whereby the flow of water in the stream and through and by the plaintiff's mill and lands shall be diminished.

Solicitors: *Hamlin, Grammer & Hamlin, for Carter, Mostyn, Roberts, Vincent & Co., Carnarvon; Robbins, Billing & Co., for Morris Owen, Carnarvon.*

G. I. F. C.

In re LAING'S SETTLEMENT. LAING *v.* RADCLIFFE.

[1898 L. 2941.]

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Jan. 23, 30; *Feb.* 13, 22.

Trustee — Investments — Investment Clause — Personal Security — Power of Investment — Power to Vary — Consent of Tenant for Life — Loan to Tenant for Life.

Trustees having a power with the consent of the tenant for life to lend the trust funds on personal security may, if satisfied that there is a reasonable prospect of repayment, lend them on personal security to the tenant for life.

The proposition to the contrary in Lewin on Trusts, 10th ed. p. 335, purporting to be founded on *Keays* v. *Lane*, (1869) Ir. R. 3 Eq. 1, is not borne out by that authority.

SUMMONS IN CHAMBERS.

By a voluntary settlement dated March 25, 1898, and made between the plaintiff, a widow, of the one part, and trustees of the other part, the plaintiff settled 750*l.* upon trust for herself for life, and after her decease for her testamentary appointees, and subject thereto upon trust for the children of her only son who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry. The trustees were directed to invest the 750*l.* in the Government and other securities therein mentioned, "or upon such personal credit without security as the trustees or trustee shall in their or his absolute and uncontrolled discretion think fit," with power from time to time, "with the consent in writing of the plaintiff during her life," and after her death at the discretion of the trustees, to vary or transpose such investments into or for others of any nature thereinbefore authorized.

The trustees were empowered to invest in the purchase of land at the written request of the plaintiff, such land to be held on the usual trusts for resale and reinvestment, with interim powers of management. They were also empowered at the like request to purchase furniture or other household effects for the use of the plaintiff, or to pay to the plaintiff for the purposes aforesaid the trust fund, or any part thereof, without being in

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any way concerned to see to the application thereof, provided that the furniture and effects so purchased should be held upon the trusts declared of the trust fund, but so that the trustees should be under no liability in respect of the custody thereof. The plaintiff was empowered to revoke the settlement at any time after the decease of her son.

On December 30, 1898, the plaintiff took out this summons against the trustees asking that they might be at liberty to advance upon loan to her upon her personal credit, without security, the whole or any part or parts of the trust funds.

On January 23, 1899, the judge ordered one of the plaintiff's grandchildren to be served. This was done; and, after standing over on January 30, 1899, the case was finally argued in chambers on February 13, 1899.

Evidence was filed to shew that the proposed loan would be of immediate advantage to the grandchildren.

Champernowne, for the plaintiff. The only difficulty in this case arises from a passage in Lewin on Trusts, 10th ed. p. 335, where it is stated that "trustees having a power, with the *consent of the tenant for life*, to lend on personal security, cannot lend on personal security to the *tenant for life himself*." In *Keays* v. *Lane* (1), however, on which the above proposition purports to be founded, the breach of trust was admitted, and the only question was whether the trustee, who had made good the loss, was entitled to be recouped by the tenant for life.

As in the analogous case of a power of sale, the right to give or withhold consent is given to the tenant for life for her own benefit, and she is in no fiduciary position in relation thereto: *Dicconson* v. *Talbot*. (2) In *Pickard* v. *Anderson* (3) a loan made on personal security before the date of the settlement was allowed to be continued on the borrower executing a bond.

W. Seymour Eastwood, for the grandchild. In *Pickard* v. *Anderson* (3) the point as to the borrower's capacity to consent to the continuance of the loan was not raised. In consenting to a change of investment, the tenant for life is in a fiduciary

(1) Ir. R. 3 Eq. 1.
(2) (1870) L. R. 6 Ch. 32.
(3) (1872) L. R. 13 Eq. 608.

position, and if she withholds her consent, the Court can in a proper case dispense with it—e.g., if the funds are invested on inadequate security: *Harrison* v. *Thexton.* (1) In *Keays* v. *Lane* (2) the Lord Chancellor said expressly that the tenant for life "was at once under the limitations of the settlement a (3) cestui que trust and a trustee bound to protect the interest of his children with reference to the disposal of the trust fund." The propositions in Lewin on Trusts, 10th ed. p. 335, and Godefroi on Trusts, 2nd ed. p. 446, based on this case, are well founded.

Feb. 22. KEKEWICH J. delivered judgment in Court. After stating the facts, his Lordship continued:—I understood it to be stated to me in chambers that the 750*l.* had been invested in one of the modes authorized by the settlement; but I cannot find this in the papers before me, and my judgment proceeds on the footing that this is immaterial, which I think it is. The plaintiff asks the trustees to advance her the whole 750*l.* without security, and the question is whether such an advance is authorized by the settlement or not.

A distinction was endeavoured to be drawn between an original investment and a change of investment, on the ground that the latter required the consent of the plaintiff, and that she could not properly consent to a change resulting in an advance to herself, and reference was made to *Harrison* v. *Thexton.* (1) I fail to see what bearing that case has on the present, or to find any reason why the trustees should not realize an existing investment and advance the money to the plaintiff with her consent, if in truth they could have advanced it before investment. The distinction, as already stated, is, to my mind, immaterial. The question whether an advance to the lady is within the powers of the settlement or not is of a different character. If no authority had been referred to, I should have had no hesitation in saying that it was authorized; but reference was made to a passage in Lewin on Trusts, 10th ed. p. 335, which is adverse to this view, and it was for

(1) (1858) 4 Jur. (N.S.) 550. (2) Ir. R. 3 Eq. 1.
(3) Misprinted "ad" in the report.

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this reason that I determined to give judgment in open Court. The statement in Lewin is this: "And trustees having a power, with the *consent of the tenant for life*, to lend on personal security, cannot lend on personal security to the *tenant for life himself*." In support of this proposition a note refers to *Keays* v. *Lane*. (1) The note also mentions that a tenant for life whose consent is necessary to the exercise of a power of sale by trustees may purchase from the trustees. This, no doubt, is correct, as will be seen from the case of *Dicconson* v. *Talbot* (2); but the suggestion is that the advance on personal security is not governed by the same considerations. My opinion, apart from authority, being what I have already mentioned, I must examine the authority cited to see whether it supports the proposition in the text. *Keays* v. *Lane* (1) was a suit against a trustee charging him with breach of trust by lending part of the trust funds to the tenant for life. The breach of trust and the liability of the trustee for it were admitted, and the question of substance was whether the trustee was entitled to impound for his benefit the interest of the tenant for life at whose instance and for whose benefit the breach of trust had been committed. The Lord Chancellor of Ireland held that the trustee was so entitled; and in truth for the present purpose there is nothing more in the case. It was argued by the counsel for the petitioners that the trustees committed a breach of trust in lending part of the trust fund to the tenant for life, and that such a loan was not authorized under the power to invest on personal security. The Lord Chancellor does not expressly notice this argument. I do not think that he can be taken to be referring to it when he says (3) that the breach of trust consisted in the calling in of the trust fund of 500*l.* in the year 1845, and the putting it out, not on proper security, but as a loan to Samuel Keays, who had the life interest in it, and on whose insolvency in 1849 it became lost and irrecoverable; nor can I see that the authorities cited by counsel in support of that argument (to which I have referred) do really support it. The truth is that the real breach of trust

(1) Ir. R. 3 Eq. 1. (2) L. R. 6 Ch. 32.
(3) Ir. R. 3 Eq. 6.

was, and was admitted to be, the advance to a man, namely, Samuel Keays, the tenant for life, who, if not in embarrassed circumstances at the time of the advance, was not, at any rate, a man of means, or one to whom such an advance could prudently be made. The advance on personal security there authorized was like the advance on personal security here treated by the settlement as a mode of investment, and it was not intended that the trustees should pay the trust money away to the tenant for life, or any one else, without a reasonable expectation of recovering it when wanted, and in that case the trustees took a bond from Samuel Keays, with a policy of assurance on his life as collateral security. It would be going too far to say that Samuel Keays' tenancy for life or its determinable character had nothing to do with the decision in that case, for it certainly had; but, on the other hand, I do not think that it is a sufficient, or indeed any, authority for the proposition in support of which it is cited in Lewin on Trusts. Being uncontrolled by authority, and seeing no objection on principle, I hold that the trustees are at liberty to advance the whole or any part of the trust property whether in their hands invested, or with the consent of the plaintiff obtained by realizing investments, to her on her personal security.

This so far answers the question asked by the summons, that it expresses the opinion of the Court that the trustees are at liberty to advance the trust fund (realizing investments if necessary for that purpose) to the tenant for life on her personal security—that is, a bond or note of hand if they think fit. This, however, I understand, will not content the trustees, who wish to know not only whether they may if they think fit, but whether they ought, under the circumstances of the case, to make the advance. In this sense I am not prepared on the present materials to answer the question. There is evidence directed to shew that it is to the advantage of the family, including in that term all who can in any event derive benefit from the settlement, that the advance should be made; but I am by no means sure that such evidence can properly be regarded, and, at any rate, I am not disposed to give much weight to it. An advance on personal security differs materially

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from an investment in any other of the modes authorized by the settlement, and strictly it is not an advance on security at all. Nevertheless, I think that what is contemplated is an advance by way of loan, with the prospect of the money being repaid and being hereafter available for the beneficiaries under the settlement. It was neglect in this respect which constituted a breach of trust in *Keays* v. *Lane* (1), and the trustees of this settlement would, I think, be guilty of a breach of trust if they advanced the money to the tenant for life without being satisfied that, sooner or later, it would be recouped to the settlement, or, at least, that there was a reasonable prospect of this being done. For this purpose it would, of course, be necessary to consider not merely the present position of the tenant for life, but also whether by means of the proposed advance she would probably improve that position, and make it more likely that she would be responsible for such a sum. The evidence does not go to this. If the trustees are willing to make the investigation themselves, and, forming their own conclusion, to act on their own responsibility, there is no occasion for me to do more than say that they are at liberty to make the advance out of the trust fund if they think fit; but if they desire my sanction, they must produce further evidence on the lines above indicated, and the summons must be adjourned for further hearing in chambers on that point.

The costs of the tenant for life and the trustees, to be taxed as between solicitor and client, must in any event come out of the trust fund.

Solicitors: *Radcliffe, Cator & Hood.*

(1) Ir. R. 3 Eq. 1.

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March 3.

In re BARONESS BATEMAN AND PARKER'S CONTRACT.

[1899 B. 254.]

Ecclesiastical Law—Churchyard—Consecration—Ground adjoining to an existing Churchyard—Intervening Highway—Consecration of Churchyards Act, 1867 (30 & 31 *Vict. c.* 133).

Land may adjoin and may be added to an existing churchyard within the meaning of the Consecration of Churchyards Act, 1867, although it is separated therefrom by a highway.

A plot of ground separated from a churchyard by a highway about twenty feet wide was held to be "adjoining to an existing churchyard" within the meaning of the Act.

VENDOR AND PURCHASER SUMMONS.

On October 15, 1898, the vendor, as tenant for life in possession of a plot of land in the parish of Brome, Suffolk, agreed to sell it to the rector of the parish under the powers of the Consecration of Churchyards Act, 1867, for the purpose of enlarging the churchyard.

The existing churchyard and the new plot were on opposite sides of a public highway about twenty feet wide, the churchyard having a frontage of 162 feet, and the new plot a frontage of 100 feet.

It was common ground that if the Consecration of Churchyards Act, 1867, applied, the expenses of consecration would be materially diminished.

The purchaser admitted the vendor's title as tenant for life, but objected that the Consecration of Churchyards Act, 1867 (1),

(1) The Consecration of Churchyards Act, 1867, provides as follows: "Whereas it is expedient to diminish the expense attendant on the consecration of portions of ground adjoining and added to existing churchyards: Be it therefore enacted . . . . as follows:—"

Sect. 1: "Where any ground adjoining to an existing churchyard has been or is added thereto, the bishop of the diocese may . . . . sign an instrument declaring or recording the consecration of such ground, without the presence of the chancellor or registrar of the diocese being necessary . . . . and such instrument . . . . on being deposited in the registry of the diocese, shall have the same effect as a sentence of consecration." (The section also

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did not apply, as the new plot did not strictly adjoin the existing churchyard.

On January 18, 1899, the vendor took out a summons asking for a declaration that she had power to sell the said plot under the said Act.

J. M. Stone, for the vendor. The 'Oxford English Dictionary,' edited by Dr. Murray, defines "adjoining" as "Lying next, contiguous, adjacent; neighbouring." It does not necessarily mean "contiguous": witness the phrases "adjoining street," "adjoining room."

Lands separated by a private road, *Coventry* v. *London, Brighton and South Coast Ry. Co.* (1), or by a wall, *London and South Western Ry. Co.* v. *Blackmore* (2), have been held "adjoining" within s. 128 of the Lands Clauses Consolidation Act, 1845. Again, properties on opposite sides of a street have been held "adjoining or contiguous" under the presumption of ownership usque ad medium filum: *Haynes* v. *King.* (3)

As to this presumption, vide *Micklethwait* v. *Newlay Bridge Co.* (4), and *In re White's Charities.* (5)

The purchaser will probably rely on s. 7, which speaks of "the Inclosure of the same within One Boundary Fence."

W. M. Spence, for the purchaser. Sect. 7 merely refers to the inclosure of the added land, and is not in point.

Sect. 128 of the Lands Clauses Consolidation Act, 1845, which gave adjoining owners a right of pre-emption, was rightly construed liberally in their favour. The present statute is really penal, as it deprives many officials of their livelihood. It must therefore be construed very strictly. "Ground cannot be pro-

ncludes provisions for attestation and a form of the instrument.)

Sect. 2: "No officer of the bishop or of the diocese shall receive any fee for attendance at such consecration, or any allowance for travelling or for attendance."

Sect. 3: "A fee of five shillings shall be payable to the registrar for the deposit of every such instrument of consecration."

Sect. 4 incorporates the powers of the School Sites Acts, enabling a tenant for life to convey without the concurrence of the remainderman.

Sect. 5 provides a form of conveyance.

(1) (1867) L. R. 5 Eq. 104, 108.
(2) (1870) L. R. 4 H. L. 610, 618.
(3) [1893] 3 Ch. 439.
(4) (1886) 33 Ch. D. 133.
(5) [1898] 1 Ch. 659.

perly said to adjoin a house, unless it is absolutely contiguous, without anything between them": per Parke J. in *Rex* v. *Hodges*. (1)

[KEKEWICH J. The Century Dictionary defines one meaning of "adjoin" as, "To be contiguous to or in contact with; as, his house *adjoins* the lake, a field *adjoining* the lawn.

> "As one . . . .
> Forth issuing on a summer's morn to breathe
> Among the pleasant villages and farms
> *Adjoin'd*, from each thing met conceives delight.
> MILTON, *P. L.*, ix. 449."]

Spence. This is not an addition within the Act. A churchyard is an inclosure round a church, and an addition to an inclosure must be capable of being joined and inclosed with it so as to form one inclosure. Here there will be two inclosures or yards instead of one of increased size.

KEKEWICH J. It would be a great pity for me to attempt to define the meaning of the word "adjoining" in this Act, because, if I did so, my definition, like most other definitions, could scarcely fail to be more or less inaccurate, and to err either on the side of inclusion or of exclusion.

I therefore content myself with saying that this particular piece of land is adjoining to the existing churchyard within the meaning of the Act.

Solicitors: *G. F. Hudson, Matthews & Co.*

(1) (1829) Mood. & M. 341, 343.

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[1862 D. 122.]

Administration to Creditor—Right of Retainer—Decree for Administration—Form of Administration Bond.

The personal representative may still retain his own debt, notwithstanding a decree for administration made in a suit by other creditors, notwithstanding the assets out of which he seeks to retain came to his hands after the decree, and notwithstanding the present form of a creditor's administration bond, which provides for a due course of administration "rateably and proportionably and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of being an administrator as aforesaid."

Nunn v. *Barlow*, (1824) 1 S. & S. 588, examined and followed.

Jones v. *Evans*, (1876) 2 Ch. D. 420, distinguished.

Adjourned Summons.

The principal question raised by this application was whether an administrator was deprived of his right of retainer by the present form of a creditor's administration bond. The facts, so far as material, were as follows:—

Thomas Parry, a solicitor, died intestate in November, 1862, and letters of administration to his estate were granted to his widow, Mary Parry, on December 11, 1862.

On December 20, 1862, the usual decree for the administration of the real and personal estate of Thomas Parry was made in this action: the plaintiffs were creditors; the defendants were Mary Parry and Thomas Parry's heir-at-law.

In January, 1867, the chief clerk by his certificate found that a debt of 405*l.*, for taxed costs in the suit of *Tardrew* v. *Howell*, was due to the estate of the deceased, for the payment of which there was no available fund until after the death of one Hannah Howell; and he also found, amongst other creditors, that one William Bonville was a simple contract creditor for 136*l.*

Thomas Parry's estate proved insufficient for payment of all his creditors in full, and William Bonville received some 58*l.* only in respect of his debt of 136*l.*

William Bonville died in 1872, having appointed his son, William Bonville the younger, his sole executor, by whom his will was duly proved in January, 1873.

The defendant Mary Parry died intestate in March, 1890, and in July, 1897, letters of administration de bonis non of the personal estate and effects of the said Thomas Parry were granted to the said William Bonville the younger, as a creditor of the said intestate Thomas Parry deceased. William Bonville the younger executed the usual "Bond of a Creditor on taking Administration" [Form No. 18*a* P. R.], which, since *In the Goods of Brackenbury* (1), contained provision that the administrator "do well and truly administer according to law (that is to say) do pay all and singular the debts which he," the intestate, "did owe at his decease in a due course of administration rateably and proportionably and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of being an administrator as aforesaid."

Hannah Howell having died, a sum of 257*l.* was, by an order made in *Tardrew* v. *Howell* in February, 1898, directed to be paid to William Bonville the younger as the legal personal representative of Thomas Parry, on account of the said debt of 405*l.* for taxed costs.

William Bonville alleged that the sum owing to his late father's estate from Thomas Parry's estate, for arrears of interest on the said debt and the unpaid balance of the same, now amounted to the sum of 182*l.*, and he now applied, by summons in the above action, for a declaration that as administrator de bonis non of the personal estate of the intestate, the above-named Thomas Parry deceased, he had a right to retain the sum of 182*l.*, in discharge of a debt owing to him by the said deceased out of a sum of 257*l.* moneys come to his hand as legal personal representative of the said Thomas Parry deceased, with a further sum of 25*l.* on account of costs, and that he might be at liberty to pay into court the balance of the said sum of 257*l.* to the credit of this action.

This summons was adjourned into court.

(1) (1877) 2 P. D. 272.

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Farwell, *Q.C.*, and *Douglas*, for the administrator. The law gives an administrator the right to retain his own debt: can he be said to be "unduly preferring his own debt" when he retains it in the manner allowed by law?

[ROMER J. If I remember rightly, these words were put in on purpose to exclude the right of retainer, and this creditor's bond was settled in its present form in consequence of the decision in *In the Goods of Brackenbury*. (1)]

That may be so; but if the words are not sufficient expressly to exclude the right of retainer, the right still exists; there can be no undue preference in exercising an ordinary legal right. The legal personal representative can retain his own debt notwithstanding a decree in an administration suit by other creditors, and notwithstanding the fact that the assets out of which he seeks to retain his debt came to his hand after the decree: *Nunn* v. *Barlow*. (2) That case is precisely in point, and has not been weakened by *Jones* v. *Evans*. (3) An administrator can also retain for debts to which he is entitled only as trustee: *Re Faithfull*. (4) In fact, an administrator is bound to retain, and would be guilty of a devastavit if he did not: *Fox* v. *Garrett*. (5) That being the law, the wording of this bond is not strong enough to deprive this administrator of his right to retain.

Neville, *Q.C.*, and *Elgood*, contra. *Jones* v. *Evans* (3) would seem to shew that the right of retainer now claimed was not so strong as the present applicant seeks to make out: *Nunn* v. *Barlow* (2) was cited in that case.

[ROMER J. The applicant there was a mere legatee, and all that Hall V.-C. meant to decide was that the executrix, as legatee, had not the same right of retainer as her testator might have had.]

According to the wording of the bond the debts are to be paid "rateably and proportionably" and without undue preference "by reason of being an administrator": these words are clearly aimed at the executor's right of retainer, and are

(1) 2 P. D. 272.
(2) 1 S. & S. 588.
(3) 2 Ch. D. 420.
(4) (1887) 57 L. T. 14.
(5) (1860) 28 Beav. 16.

sufficient to deprive the applicant of the right to retain in the present case. That this was the intention is plain from the observations of Sir James Hannen in *In the Goods of Brackenbury*. (1) In construing this bond the Court should have regard to the special circumstances of this case.

ROMER J. There is no doubt that the question raised here is a very important one; but I do not see how I can refuse to allow the right of retainer claimed by the administrator. It is settled law, by decisions which I cannot review, that an administrator has a right of retaining, out of the legal assets, a debt due to himself as trustee, although there may be other creditors, and the estate be insolvent. It is also settled that an administrator can do that even though there has been a decree for administration, and even though the debt which he claims to retain has been proved in the administration action. I may refer in support of that last proposition to the case of *Nunn* v. *Barlow*. (2) That case having been decided so long ago, I certainly cannot review it. It was argued before me, or rather suggested, that the case of *Jones* v. *Evans* (3) threw doubt on that case, or shewed that that case ought not to be followed. But the case of *Jones* v. *Evans* (3), which came before Hall V.-C., was perfectly distinct. There the executrix who claimed the right of retainer did not represent a dead creditor who had proved in the administration action against the testatrix's estate, but was a mere legatee under that creditor's will and nothing more. Of course, as legatee that executrix had no right to retain that debt, and it was so held. That case did not in my opinion differ from, or throw doubt on, *Nunn* v. *Barlow* (2), to which I have already referred. So far, therefore, as this Court is concerned, there would appear to be no answer to the claim of this administrator to retain this debt. What I desire to point out is that I wish the law was not so, but that being the law, I must follow it. That raises a very important question indeed as to the form of the bond which was entered into by the creditor when he obtained letters of administration de bonis non: it is said that this bond deprives

(1) 2 P. D. 272. (2) 1 S. & S. 588. (3) 2 Ch. D. 420.

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him of his right of retainer, and it is said that I ought to construe that bond with reference to the special facts of this case, namely, that there had been an administration decree, and a proof of debts in the administration. I cannot do that. This bond is in common form: there is nothing on the face of it to shew that it was entered into with reference to this particular estate. How can I construe this bond with reference to the special circumstances of this case in one way, and when that same bond comes before me in another case say that I ought to place a different interpretation on it? I must put upon this bond the proper interpretation regardless of the special circumstances of this case. When I look at it, it may well be that when the first bond was settled it may have been the object of those who framed it to exclude the right of retainer: I say that, having regard to the observations of Sir James Hannen in the case of *In the Goods of Brackenbury* (1), to which my attention has been called. Whatever the intention was, I can only look at the words of the bond, and unless I can gather that intention from the words of the bond, I cannot regard it. Now I will look at the bond, and one of the conditions of the bond is that the administrator shall "well and truly administer according to law (that is to say) do pay all and singular the debts which he did owe at his decease in a due course of administration rateably and proportionably and according to the priority required by law." I pause there before construing the following words to consider what that means. If the words I have read stood alone, it might well be that the administrator might find himself in this unpleasant position: he might have ample assets, and he might have an undoubted creditor of the intestate coming to him and saying, "Please pay my debt out of the assets you have in hand." The administrator might know nothing whatever of the existence of any other debts, and might have every reason to believe the estate solvent. Would it be right that, because of those words, he should be made liable for paying this debt out of the assets in the event of subsequent debts, of which he had no notice, turning up? And again, ought he to be considered as having

(1) 2 P. D. 272.

broken his bond because he did not pay all the debts rateably and in proportion? That would be a strange position in which to place an administrator, and it would be curious to see what the liability was. If an administrator ought to be held entitled, when he has ample assets and knows of the existence of no other debts, to pay the debts he does know of, he ought to be allowed to do so; and if he may pay other debts, why may he not pay his own? I do not think it was ever intended to place an administrator in this difficult position; but the bond might have been so construed if the words stopped at the place I broke off. But the words do not stop there. I think I have shewn a very good reason why they should not; everything preceding is governed, in my opinion, by the following words: "and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator as aforesaid." It is contemplated that there may be circumstances in a particular case which ought to be considered. Therefore, very properly this bond gives him the power of preferring, so long as he does not do it unduly. What does "unduly" mean? How can I hold that an administrator has not a right, in a proper case, out of the legal assets to retain a debt due to himself as a trustee? I cannot hold it. It is not "unduly preferring" this debt. Indeed, if as trustee he represents a creditor, he is compellable at the instance of his cestui que trust to enforce his rights. How can I hold that an administrator is unduly preferring his own debt when the law says that he may retain payment of it? I do not see my way so to hold, and for the reasons given I hold that the true construction of this bond still leaves it open to the administrator to retain his own debt, so long as the law allows him this right of retainer, and so long as he is not in that respect acting unduly. For these reasons I hold that the administrator is entitled to retain his debt in accordance with his summons, and he will be at liberty to pay the balance into court. Both parties will be allowed their costs.

[His Lordship subsequently directed the summons to be

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restored to the paper for further argument and investigation of the authorities in which retainer had been allowed after decree.]

Farwell, Q.C., and *Douglas*. It seems clear that under the old law the personal representative had the right of retainer we now claim.

[ROMER J. Did not that old right depend upon an executor's right of giving preference to a creditor, which would be taken away by a decree for administration? The right to prefer one creditor to another is now gone, and with it the right of retainer.]

No; that very point is dealt with by James L.J. in *Lee* v. *Nuttall* (1), where *Nunn* v. *Barlow* (2) was cited. In *Mason* v. *Williams* (3) it is laid down that an executor may pay debts of a higher nature after a decree quod computet, which is equivalent to a decree for accounts. The form of decree in *Nunn* v. *Barlow* (2) is not given; the report only says "the usual decree was made."

[ROMER J. One of the registrars has been good enough to look up the record, and tells me that the decree in *Nunn* v. *Barlow* (2) was a full administration decree.]

A claim by a personal representative to retain after decree has been allowed in *Spicer* v. *James* (4), *Thompson* v. *Cooper* (5), and *Sharman* v. *Rudd*. (6) And in *Ex parte Campbell* (7), Bacon V.-C., whose experience of the old forms of administration decrees was very great, says (8) that he entertains no doubt that, under an order that the estate shall be applied in a due course of administration, the executor's right to retain is preserved. *Nunn* v. *Barlow* (2) was expressly followed in *Re Orme*. (9)

Neville, Q.C., and *Elgood*, contra. It would appear from a note to *Bright* v. *Woodward* (10) that *Mason* v. *Williams* (3) seems to decide that retainer was not allowed after final decree:

(1) (1879) 12 Ch. D. 61, 64.
(2) 1 S. & S. 588.
(3) (1698) 2 Salk. 507.
(4) (1835) 2 My. & K. 387.
(5) (1844) 1 Coll. 81.
(6) (1858) 27 L. J. (Ch.) 844.
(7) (1880) 16 Ch. D. 198.
(8) Ibid. 200.
(9) (1883) 50 L. T. 51.
(10) (1685) 1 Vern. 369.

that is the only dictum we can find in any way conflicting with the authorities cited and relied on for the administrator. Our contention was that the present form of the bond had altered the old law of retainer, and the Court has already dealt with that point.

ROMER J. It appears to me I cannot add anything substantial to what I have said before. I have been so reluctant to allow this claim of retainer, and personally feel it so unjust, that I have had this case reargued, to see if I can find any ground on which I could base a judgment that the right of retainer ought not to be allowed; and I am sorry to say, speaking for myself only, I cannot see my way, as the authorities exist, not to allow it. Further argument only strengthens the view I had taken as to the binding effect of *Nunn* v. *Barlow*. (1) *Nunn* v. *Barlow* (1), as it appeared on further investigation, has been followed and recognised for years. On one point I had this restored to the list. It occurred to me that possibly *Nunn* v. *Barlow* (1) might have proved to have been a case where there was no absolute decree for administration, but only a mere direction for an account; but I find that *Nunn* v. *Barlow* (1) was actually a case where a full decree for administration had been made. I thought that it might possibly be argued at this time, that where a decree for administration had been made, inasmuch as that clearly prevented a legal personal representative from paying one creditor in preference to another, that that also ought to prevent the right of retainer, on the ground, as it occurred to me, that the right of retainer really was only a right on the part of the legal personal representative to prefer himself because he was a creditor, and that if he had not a right to prefer one creditor to another he would not have had the right to prefer himself. But it is not so. It is clear, as I have said, that *Nunn* v. *Barlow* (1) has been followed in many cases where full decrees of administration have been made, and in which the right of retainer has been allowed, although the right of preferring one creditor to another has not been allowed. And indeed in the authority, to which my attention was called,

(1) 1 S. & S. 588.

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of *Lee* v. *Nuttall* (1), James L.J. pointed out that the right of retainer could not depend upon the right of the legal personal representative to prefer himself as one of the creditors, because, if that had been the doctrine, the right would stop where there was a full decree for an administration. James L.J. points out that that was not the law. The law was that a right of retainer remained, although the right to prefer one creditor to another had ceased. It appears to me, therefore, that it is impossible at the present day to impeach *Nunn* v. *Barlow* (2), or the subsequent decisions in which the doctrine as there laid down has been accepted and followed. I will only add further, with regard to the form of this bond, that looking at it again with careful consideration to see if I can with any justice hold that on the terms of it the right of retainer is taken away, my view that it is not taken away by the words of this bond is strengthened, because I have noticed these words, which I had not noticed before, that the whole substantial part of the order is prefaced by the words, "do well and truly administer according to law (that is to say)"; then follow the words which I have previously dealt with in my former observations. It clearly allows an administrator to prefer himself, if it is according to law, and is not undue. How can I say it is not according to law and is undue, when these authorities say it is according to law and it is a due preference? I can only, therefore, say that I have reluctantly come to the same conclusion as I came to before.

Solicitors: *Berkeley-Calcott, Holloway & Tudor; Shirley Woolmer, for C. E. Morris, Carmarthen.*

(1) 12 Ch. D. 61, 64.

(2) 1 S. & S. 588.

W. C. D.

JONES *v.* BARNETT.

ROMER J.

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Feb. 1, 2, 25.

[1898 J. 552.]

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 70 *sub-s.* 1—*Sale by Order of the Court—Purchaser for Value without Notice.*

If an order of the Court dealing with property, having regard to its terms and the proceedings in which and the circumstances under which it was made, would not be held, apart from s. 70, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, to be intended to bind any particular estate or interest in the property, then that estate or interest will not be bound by the order by reason or virtue of that sub-section.

In re Hall Dare's Contract, (1882) 21 Ch. D. 41, and *Mostyn* v. *Mostyn*, [1893] 3 Ch. 376, discussed and distinguished.

THIS was an action claiming possession and mesne profits of a certain leasehold house and shop situate in Cwnavon Road, Aberavon, in the county of Glamorgan, and of two freehold cottages situate in Walnut Tree Lane, Aberavon.

By his will dated August 1, 1886, John Williams devised and bequeathed all his real and personal estate not otherwise disposed of to trustees upon trust as to his personal estate for conversion as therein mentioned, and as to his real and chattel real estate upon trust to permit his wife to receive the rents to arise therefrom during her life, and after her decease the testator bequeathed his leasehold house and shop, situate in Cwnavon Road, to his nephew, Isaac Jones, for such term as the testator had therein at his decease, and he devised his two freehold cottages, situate in Walnut Tree Lane, unto and to the use of Isaac Jones.

It appeared that Isaac Jones, who was joined as defendant in the action but who did not appear, was in 1894 in pecuniary difficulties, and was indebted to Philip Jones, the husband of the plaintiff Mary Jones, who was Isaac Jones's sister, in the sum of 350*l.*

By an indenture dated May 31, 1894, made between Isaac Jones of the first part, Philip Jones of the second part, and Mary Jones of the third part, after reciting the will of John Williams, his death, and probate of his will, and that Isaac

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Jones was one of the legatees named in the said will, and was indebted to Philip Jones in the sum of 350*l.*, and after reciting that Isaac Jones had agreed to assign to Mary Jones all his share, right, title, and interest in the real and personal property so bequeathed to him as aforesaid for the consideration therein mentioned, it was witnessed that, in consideration of the sum of 350*l.*, Isaac Jones, as beneficial owner, assigned to Mary Jones, and Philip Jones thereby confirmed all the share, right, title, and interest to which Isaac Jones in his right was then, or should or might thereafter be, entitled under the said recited will, to hold the same unto the said Mary Jones absolutely.

On February 26, 1895, the defendant Barnett obtained judgment against the said Isaac Jones for 450*l.* in an action in the Queen's Bench Division of *Barnett* v. *Jones* [1895 B. No. 80], and on March 14, 1895, by an order in that action, a receiver was appointed of Isaac Jones's reversionary interest in the above-mentioned freehold and leasehold property.

On July 10, 1895, a petition was presented on behalf of the defendant Barnett, before Chitty J., intituled, "In the Matter of Isaac Jones and the Judgments Act, 1864," praying a sale of the interest of Isaac Jones in the property of which the receiver had been appointed.

By an order made on this petition, dated July 24, 1895, an account was ordered to be taken of what was due to the petitioner under the said judgment of February 26, 1895, and an inquiry was directed what interests of Isaac Jones had been delivered in equitable execution by the said appointment of a receiver, an inquiry whether there were any and (if any) what liens, charges, or incumbrances on the interest in land of the said Isaac Jones, their amounts and priorities, and of those which were prior and which subsequent to the said receivership order, and which, if any, created subsequent to such order were before the registration of such order created in favour of a purchaser for value; and it was ordered that Isaac Jones should pay what should be certified to be due within one month after the chief clerk's certificate; and it was ordered that in default of the said Isaac Jones paying the amount so certified, his said interests in land should be sold with the approbation of the

judge, free from all liens, charges, or incumbrances created subsequent to the said order of March 14, 1895, except any such created in favour of a purchaser for value before the registration of such order.

On January 20, 1896, the chief clerk certified that 509*l.* 19*s.* was due; that the property consisted of the leasehold shop and freehold cottages above mentioned; and that there were no charges or incumbrances on Isaac Jones's interest therein.

Isaac Jones having paid no part of his debt, the property was put up for sale by auction on December 16, 1896, when the defendant Barnett, who had obtained an order authorizing him to bid at the sale, was declared the highest bidder for 375*l.*, and by an order dated February 19, 1897, it was ordered that a person should be appointed to convey the said interest of Isaac Jones in the property to the defendant Barnett, and a conveyance was subsequently executed.

The tenant for life died on March 16, 1897. The defendant Barnett took possession, and the deeds relating to the property were subsequently handed over to him by the executors of the will of the said John Williams.

Neither the defendant Barnett nor his solicitors had any notice or knowledge of the assignment to the plaintiff of May 31, 1894, until a letter came from the plaintiff's solicitor to the solicitor of the defendant Barnett on April 15, 1897, claiming that the plaintiff Mary Jones was entitled to the property under the said assignment.

After hearing the witnesses for the plaintiff, it was intimated that if his Lordship was prepared to hold upon the facts that the assignment to the plaintiff was a bonâ fide assignment, and that the defendant Barnett had purchased with no notice of such assignment, that in such case the defendant would rely upon s. 70 of the Conveyancing and Law of Property Act, 1881 (1), as giving him a better title than the plaintiff's prior

(1) 44 & 45 Vict. c. 41, s. 70, sub-s. 1: "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

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title, and his Lordship expressed a desire to hear the defendant upon this point.

Neville, Q.C., W. F. Phillpotts, and *Ralegh B. Phillpotts*, for the defendant Barnett. The defendant is a purchaser for value without notice, and s. 70 of the Conveyancing Act, 1881, operates to give him a good title to the property, free from the claim of the plaintiff under the deed of May 31, 1894: *In re Hall Dare's Contract* (1); *Mostyn* v. *Mostyn*. (2)

Farwell, Q.C., and *Napier*, for the plaintiff. If the defendant's contention is correct, and if all persons interested in the property are bound by the order for sale, then the purchaser need not look beyond the order. An owner of an estate might find himself deprived of it by an order of the Court in some proceeding he had never heard of, and there being no intention on the part of the Court to affect him, and then be told he has no remedy except to follow the purchase-money. The contention is an extravagant one, and is not one which the Court will adopt. In *Whitworth* v. *Gaugain* (3) it was held that an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit without notice of the mortgage.

[They also referred to *Baroness Wenlock* v. *River Dee Co.* (4) and *In re National Debenture and Assets Corporation*. (5)]

Neville, Q.C., in reply.

Cur. adv. vult.

Feb. 25. ROMER J. No real difficulty arises with regard to the facts of this case. I am satisfied that P. Jones, the plaintiff's husband, did contract to buy from Isaac Jones the property the subject of this action, subject to the then existing prior life interest, for the sum of 350*l.*, which was then due from Isaac Jones to P. Jones on an account settled between

(1) 21 Ch. D. 41.
(2) [1893] 3 Ch. 376.
(3) (1846) 1 Ph. 728.
(4) (1888) 38 Ch. D. 534.
(5) [1891] 2 Ch. 505.

them; and the property was intended to be, and was, assured to the plaintiff by the deed of May 31, 1894, and this deed was duly executed and delivered, and passed to her the legal estate in the leaseholds and also in the freeholds, at any rate for her life. I have further come to the conclusion that this transaction was entered into in good faith and for full valuable consideration, and was not a fraudulent preference of P. Jones, or executed to defeat creditors to the knowledge of P. Jones or the plaintiff, and is not void as against the defendant Barnett either under the statute 13 Eliz. c. 5 or otherwise. It is true that Isaac Jones had refused to join in the transaction, or to let P. Jones have the property, unless it was (as P. Jones expressed it) settled upon the plaintiff, who was Isaac Jones' sister, so as to benefit her and her children. But when the transaction is rightly understood, I am convinced that it was not in the nature of a mere part payment by P. Jones for the property, and a voluntary settlement by Isaac Jones in favour of his sister. I have had the advantage of seeing in the box P. Jones, who gave me the impression of being an honest witness, though of humble position and not acquainted with English legal terms, and the conclusion I have come to on the evidence as a whole is that the transaction on his part was a purchase in good faith for full consideration, and not the less so because he was quite willing to let his purchase become his wife's property as desired by her brother. If a man offers to buy a property for a sufficient and proper price, and the owner expresses his willingness to sell for that price, provided that the purchaser will let the conveyance be to the purchaser's wife who is related to the owner, and the purchaser for reasons of his own is willing to let the purchased property be so conveyed, and a bargain is thus made, and is carried out, such a transaction is not a voluntary settlement in any true sense, or anything but a sale and purchase for value and in good faith; and in my opinion the case before me when properly appreciated is in substance one of this kind. Notice of the sale and assurance to the trustees of the will under which Isaac Jones was entitled was of course not necessary to complete the plaintiff's title, but there was in my

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judgment no intentional abstaining by P. Jones or the plaintiff from giving such notice. Indeed, though it is not necessary to determine the point, on the evidence it appears to me that one of the trustees was informed of the transaction. The fact is that P. Jones knew nothing of law, and left it to his solicitor to carry out the transaction properly. Nor is there any real ground for the suggestion on the defendant's behalf that the plaintiff or P. Jones knew of the later proceedings under which the defendant Barnett purported to buy the property and have it assured to him, or abstained from informing him of the plaintiff's prior title. On the other hand, it is not proved to my satisfaction that the defendant Barnett bought with notice of the plaintiff's title.

On these findings of fact the question is reduced to one of law, whether the defendant has a better title than the plaintiff, although the plaintiff had a prior legal title. The only ground on which it can be suggested that the defendant has a better title is that by virtue of s. 70 of the Conveyancing and Law of Property Act, 1881, the plaintiff's prior title was destroyed as against the defendant, because the property was sold and assured to him under orders of this Court. Those orders came to be made under the following circumstances: The defendant as judgment creditor of Isaac Jones obtained equitable execution as against Isaac Jones' then interest in this property by the appointment of a receiver, though there was then nothing to receive, inasmuch as the prior life tenant was then living and in receipt of the rents and profits. The defendant then proceeded under the Judgments Act, 1864, and obtained the usual order under which the debtor's interest so delivered in execution was ordered to be sold, and the usual inquiries were directed to ascertain the nature and extent of that interest. That order is dated July 24, 1895. The inquiries thereby directed were proceeded with, and as Isaac Jones did not appear and no one before the Court knew anything about the assurance to the plaintiff, naturally enough, in answer to the inquiries, the chief clerk, by his certificate in finding that the interest delivered in execution was the reversionary interest under the will, made no reference to the plaintiff's rights or

title or to any incumbrance on that reversionary interest. The sale directed by the order of July 24, 1895, was then proceeded with, and the debtor's interest as found by the chief clerk's certificate was offered for sale by public auction subject to certain conditions of sale. At that sale the defendant, having obtained leave to bid, was declared the purchaser, and was subsequently allowed to set off the purchase-money against a corresponding part of the larger judgment debt due to him. And then by an order dated February 19, 1897, the Court being of opinion that it was expedient for the purpose of carrying the sale directed by the order of July 24, 1895, into effect, that a person should be appointed to convey the said interest of Isaac Jones, ordered that one J. Thomas should be appointed to convey the said interest to the defendant as purchaser or as he should direct. And accordingly by deed dated March 4, 1897, the said interest was assured by J. Thomas to the defendant. Now, in these proceedings it is clear that the Court by the order of July 24, 1895, was only ordering the sale of the debtor's interest as delivered in execution by the appointment of the receiver, and that the order of February 19, 1897, was made for the purpose of carrying out the sale effected under the order of July 24, 1895. Under these circumstances it is very startling to be told that by virtue of s. 70 of the Act of 1881 the plaintiff has been deprived of her title, although that title existed prior to the equitable execution and she was a complete stranger to the proceedings, and the Court could never have contemplated or intended to bind or affect her. And when the argument of the defendant's counsel upon s. 70 is fully developed, it is found of necessity to lead, if sound, to very astonishing conclusions. It is contended that, since s. 70 came into force, when any property is sold by the Court in any proceedings before it, an indefeasible title is acquired by the purchaser, because all persons interested are bound even though they may be perfect strangers to the proceedings and not in the contemplation of the Court at all when it made the order for sale. And it would follow, if such a contention was correct, that the practice of the Court in selling under proper conditions of sale has been quite wrong since s. 70 came into force, for if

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all persons interested in the property are bound by the order for sale the purchaser need not look beyond that order. It would certainly be extraordinary if the effect of s. 70 was to change to such an extent the well-understood scope and object of orders for sale made by the Court. Take, for example, the case of an action to administer the estate of a testator in which some property is ordered to be sold as part of that estate. Apart from the section, the sale would never be held to bind or affect persons claiming, not under the will of the testator, but against him and against those claiming through him. Yet, according to the contention, the section has had the effect of making the sale quite different in its scope by binding all such persons. And similar considerations would apply to orders for sale made in partition actions, and foreclosure and redemption actions, and numerous others. And the effect of the section cannot be limited to orders for sale. In terms, the section applies in favour of a purchaser to any order of the Court. And "purchaser" includes by definition lessee or mortgagee or an intending purchaser, lessee, or mortgagee or other person who, for valuable consideration, takes or deals with any property. And, with certain express exceptions, the section applies to all orders made before or after the commencement of the Act. If the contention before me be correct, the section has indeed made a wonderful change. An owner of an estate might suddenly find himself wholly deprived of it by an order of Court in some proceeding he never heard of, and without any intention on the part of the Court to affect him, and then be told that he had no remedy except possibly to follow (if he could) any moneys that might have been paid by a purchaser. But I need not enlarge upon the results to which such a construction of the section would lead. In my opinion the section was not intended to have, and has not, such a wide effect. It is an useful section, and I should be sorry to limit its utility. But I think due effect can be given to it without yielding to such an extravagant contention as that before me. I shall not pretend to define all the cases to which the section can properly be held to apply or not to apply. But in my judgment the following proposition is correct: If an order of Court dealing

with property, having regard to its terms and the proceedings in which and the circumstances under which it was made, would not be held, apart from s. 70, to be intended to bind any particular estate or interest in the property, then that estate or interest would not be bound by the order by reason or virtue of the section. And I may point out that the section only speaks of orders of Court not being invalidated as against a purchaser with or without notice on certain specified grounds, and that, as a rule, a stranger to an action may assert his rights without being obliged to invalidate any orders that may have been made in such action.

The cases cited in support of the defendant's contention do not warrant it. With regard to *In re Hall Dare's Contract* (1) all I need say is that there the parties whose concurrence to the order for sale was dispensed with were clearly intended to be bound by the order, and that if the section did not apply to that case I do not know to what case it could be held to apply. As to *Mostyn* v. *Mostyn* (2) I feel more difficulty. So far as the actual decision in that case is concerned it was only one determining a question of form of conveyance which had arisen in an administration action as between vendors and purchasers. But one reason given for their decision by the Lords Justices undoubtedly was that certain puisne mortgagees who were strangers to the action were bound under the section by the order for sale. Speaking with all respect, I do not clearly see how they arrived at that conclusion, especially as they also held that the first mortgagees, who had agreed to join in the sale, were not bound by the order, and that as those mortgagees were not before the Court or parties to the contract for sale the Court had no power to compel them to submit to the purchasers' requirements. I gather, however, that the Court, having regard to the conditions of sale and other circumstances of the case, came to the conclusion that the Court by its orders did intend to bind, and had bound, the puisne mortgagees and their interests in the property ordered to be sold, though those puisne mortgagees were strangers to the action. This being so, the case is quite distinguishable from the case

(1) 21 Ch. D. 41. (2) [1893] 3 Ch. 376.

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now before me, where, having regard to the fact that the sale was ordered under the provisions of the Judgments Act, 1864, and was clearly intended to be a sale of the debtor's interest of which the creditor had obtained equitable execution, I am satisfied that the plaintiff's interest in the property was not intended to be, and was not in fact, bound. And, in particular, on examination of the order of July 24, 1895, it will be seen that the sale was intended to be subject to all incumbrances on the property existing at the date of the equitable execution, except those of such incumbrancers as should consent to the sale. It is said that the plaintiff's estate was not an "incumbrance" properly so called. I am not satisfied even of that. In Wharton's Law Lexicon I find "incumbrance" defined as being "a claim, lien, or liability attached to property," and this definition is wide enough to cover the plaintiff's claim. But even supposing that the plaintiff's right was not an incumbrance strictly so called, yet the wording of the order as well as the general provisions of the Judgments Act, 1864, make it clear, in my opinion, that the Court was not intending to bind any right or estate in the property existing at the date of the equitable execution which was binding on the judgment debtor and could not be displaced by him. A sale by order of the Court under that Act would not bind such a right or estate, and the owner of that right or estate could enforce it, notwithstanding the Court's order for sale, as against a purchaser under that order, though the purchaser at the time of his purchase had no notice of the existence of such right or estate. And, moreover, in my opinion, before enforcing such right or estate the owner would not be bound to invalidate the order of the Court. He could leave the order standing and say that it did not concern or affect him. See, as bearing on the point, the case of *Whitworth* v. *Gaugain* (1) with reference to the position of judgment creditors under the Act 1 & 2 Vict. c. 110. And see *Godfrey* v. *Poole* (2), a case which concerned a New South Wales Act corresponding to the Judgments Act, 1864, and where it was pointed out that a sale at the instance of an execution creditor could not pass to the purchaser a greater

(1) 1 Ph. 728. (2) (1888) 13 App. Cas. 497.

interest than the debtor possessed at the time of the execution. For these reasons it appears to me that s. 70 does not enable the defendant to resist the plaintiff's claim, and that the plaintiff is entitled to recover possession of the property and mesne profits.

Solicitors: *Riddell, Vaizey & Smith, for J. L. Howell, Swansea; Richard White, for D. Seline, Swansea.*

G. M.

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Feb. 2.

MILLER & ALDWORTH, LIMITED *v.* SHARP.

[1897 M. 3845.]

Statute of Frauds—Part Performance—Agreement for Lease—Increased Rent.

A landlord having verbally agreed with his yearly tenants to grant them a lease for twenty-one years of the messuage held by them (without the inclusion in the lease of any additional property) at an increased rent, the tenants for some time afterwards paid the increased rent :—

Held, that the decision in *Nunn* v. *Fabian*, (1865) L. R. 1 Ch. 35 (as explained by Baggallay L.J. in *Humphreys* v. *Green*, (1882) 10 Q. B. D. 148, 156), applied, notwithstanding anything laid down in *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467; that the payment of rent was a sufficient part performance to take the case out of the Statute of Frauds; and that parol evidence of the agreement was therefore admissible.

THE defendants were the owners in fee simple of a beerhouse called "The Jolly Millers" at Dartford, Kent, and which the plaintiffs Miller & Aldworth, Limited, held from them as yearly tenants at the rent of 14*l.* per annum.

In May, 1894, it was verbally agreed between the landlords and tenants that the former should grant the latter a lease of the beerhouse for twenty-one years from June 24, 1894, at the rent of 26*l.* per annum, such lease to contain the usual covenants.

In pursuance and part performance of the agreement the plaintiffs Miller & Aldworth, Limited, and the purchasers of their interest, the plaintiffs the Dartford Brewery Company, Limited, remained or were in possession from June 24, 1897, to the time of the commencement of the present action paying the increased rent of 26*l.*, which the defendants accepted.

The defendants refused to execute the lease; the two plaintiff companies brought an action for specific performance of the verbal agreement by granting a lease to the Dartford Brewery Company, Limited, or alternatively to the other plaintiff company.

The defendants, amongst other defences, pleaded that the payment of the increased rent was not sufficient part performance to take the case out of the Statute of Frauds.

At the trial the receipts for the increased rent were produced, and also a letter of March 8, 1894, from one of the defendants to Miller & Aldworth, Limited, which was as follows:—

"Jolly Millers.—My brothers and I have arranged for Mr. E. Waterman to receive the rent of the above, so kindly pay him in future. We are advised that the rent you pay is a great deal too low, but as we are unwilling to take it out of your hands we shall be glad to consider a proposal from you to take it on a lease. Kindly let us have your early reply."

The plaintiffs' counsel proposed to adduce evidence of the verbal agreement to grant a lease; but this was objected to by defendants' counsel.

Astbury, Q.C., and *Mark Romer*, for the plaintiffs. There has been part performance, by the payment and acceptance of the increased rent, sufficient to take the case out of the Statute of Frauds, and evidence is therefore admissible of the verbal agreement: *Nunn* v. *Fabian* (1); *Humphreys* v. *Green*. (2)

[They also referred to *Maddison* v. *Alderson* (3); *McManus* v. *Cooke* (4); *Williams* v. *Evans*. (5)]

Eve, Q.C., and *W. C. Dare*, for the defendants. Payment of part or even the whole of the purchase-money is not sufficient part performance to take the case out of the statute: *Maddison* v. *Alderson*. (3) Nor is payment of an increased rent, for it may be referable to something other than an agreement for a lease. *Nunn* v. *Fabian* (1) is inconsistent with what was said in *Maddison* v. *Alderson* (3); but, assuming it to be still law, the facts there were different from those in the present case, as other premises besides those originally held by the tenant were included in the verbal agreement. The observations of Brett L.J. in *Humphreys* v. *Green* (2) are in our favour.

Romer, in reply, was stopped by the Court.

BYRNE J. I am asked by the defendants to exclude parol evidence sought to be adduced to shew whether there was an

(1) L. R. 1 Ch. 35.
(2) 10 Q. B. D. 148, 156.
(3) 8 App. Cas. 467.
(4) (1887) 35 Ch. D. 681, 693.
(5) (1875) L. R. 19 Eq. 547.

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agreement, and if so what that agreement was, with reference to an alleged new tenancy.

First of all, the case alleged is that there was a yearly tenancy. Then it is said that on March 8, 1894, a letter was sent from one of the defendants referring to a proposed lease, and that there was a series of receipts for the new rent, for example, one dated September 29, 1894, which acknowledges that rent has been received, less tax, for the Jolly Millers, the name of the public-house which is the subject of the action.

Now the case of *Nunn* v. *Fabian* (1) has been referred to, and has been commented on in an ingenious argument by Mr. Eve. That case has never been overruled, and is a leading authority. Lord Cranworth L.C. there held that a parol agreement for a lease for twenty-one years at an increased rent might be established, notwithstanding the Statute of Frauds, when payment of a quarter's rent at the increased rental was proved, as part performance of the agreement. Evidence of the payment was there admitted, and it was held that the agreement was proved and must be specifically performed. Mr. Eve says that the decision turned on the special facts of the case, from the report of which it appears that other property was to be included in the new lease besides that which the tenant had formerly held from the landlord, whereas in the present case only the same property is alleged to have been taken at an increased rent.

I think, however, that in considering what was the ratio decidendi in *Nunn* v. *Fabian* (1), regard must be had to the observations of Baggallay L.J. in *Humphreys* v. *Green*. (2) The Lord Justice, after stating that he had been counsel in *Nunn* v. *Fabian* (1) and referring to the facts of it, said: "The receipt for the balance of rent did not contain all the necessary elements of the contract; if, therefore, the plaintiff was entitled to a decree for specific performance, it must have been upon the ground of proof of a sufficient part performance to take the case out of the statute, and so Lord Cranworth held. The fact of the plaintiff being in possession of the property was

(1) L. R. 1 Ch. 35. (2) 10 Q. B. D. 148, 156.

not a sufficient part performance of the parol agreement, for it was equally consistent with his continuing in possession under his previous tenancy, as of his possession being due to some agreement between himself and his landlord; moreover, Lord Cranworth declined to treat a proved expenditure of money upon the property as a part performance; but he held *that there was a clear part performance by payment and acceptance of the Michaelmas rent at the increased rate*, being of opinion that the payment of the increased amount could be referable only to some agreement; and upon that ground, and upon that ground alone, he made a decree for specific performance."

I think, therefore, that *Nunn* v. *Fabian* (1) is an authority in point, and that there is nothing inconsistent with it in the observations of Lord Selborne L.C. in *Maddison* v. *Alderson* (2), where he said: "Lord Hardwicke in *Gunter* v. *Halsey* (3) said, 'As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement' ('the terms of which,' he added, 'must be certainly proved'). He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance. . . . This Lord Cowper . . . . and Lord Macclesfield . . . . had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full. . . . Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged."

(1) L. R. 1 Ch. 35. (2) 8 App. Cas. 467, 478.
(3) (1739) Amb. 586.

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In the present case what was done could not refer to the old tenancy, but is in my judgment an unequivocal act referable to some new contract, and that could only be a contract of tenancy. Evidence must, therefore, be admitted to shew what the contract was.

[Before the conclusion of the trial the action was compromised.]

Solicitors for plaintiffs: *Nicholson, Graham & Graham.*

Solicitors for defendants: *Boyce & Son, for Ridley & Chancellor, Dartford.*

F. E.

In re MOORE BROTHERS & CO., LIMITED.

C. A.
1898
WRIGHT J.
July 19.
C. A.
1899
Feb. 8.

Company—Prospectus—Directors—Statement that Directors will take Shares not taken by Vendor—Estoppel—Implied Agreement.

The prospectus of a company, approved and issued by the directors after the registration of the company, and inviting subscriptions for the preference shares and debenture capital, stated that the directors would take all the ordinary shares which were not taken by the vendors to the company. The vendors (who were two of the directors) and others took all the ordinary shares except 367. No ordinary shares were ever allotted to any of the other directors, and none of those directors was ever placed on the register of shareholders in respect of any ordinary shares. In the winding-up of the company, there being no evidence, except the prospectus, of any agreement between the company and one of the non-vendor directors that he should take any ordinary shares:—

Held, that the prospectus was not satisfactory proof of an agreement binding the company to allot and the director to accept such shares, and that he was not liable in respect of any ordinary shares, either on the ground of agreement or on the ground of estoppel.

Decision of Wright J. reversed.

APPEAL against the refusal of Wright J. to discharge a balance order which had been made against Milton Bartholomew for the payment of calls upon 367 ordinary shares of 20*l.* each in this company.

The company was registered under the Companies Acts on October 4, 1893. By clause 77 of the articles of association, "Until otherwise determined by a general meeting the number of the directors shall not be less than three nor more than six. The following gentlemen shall be the first directors of the company:—viz., Alfred Watson, James Moore, William Moore, Henry Blatch Wells, Milton Bartholomew, Robert Colman." By clause 78, "The qualification of every director shall be the holding of shares or stock of the company of the nominal value of 500*l.*" On October 28, 1893, the directors held a meeting, which was attended by all the six directors, including Bartholomew.

The minutes of that meeting contained the following statement: "The draft prospectus was approved and settled, and

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the secretary was instructed to place same in the printer's hands." The prospectus thus approved was printed and circulated. It invited subscriptions for the preference shares and debenture capital of the company, and it stated that the capital of the company was "1500 ordinary shares of 20*l.* each (the whole of which will be taken by the directors), 750 6*l.* per cent. preference shares of 20*l.* each, and 300 5*l.* per cent. debentures of 50*l.* each."

The prospectus also stated the names and addresses of the six directors, and added (inter alia): "The vendors, after discharging every liability up to the date of purchase, will reinvest the whole of the purchase-money in the company, principally in the ordinary stock, on which they will receive no dividend until the 5*l.* per cent. interest on the debentures and the 6*l.* per cent. dividend on the preference shares have been paid. Seeing that—with the other directors—they take the whole of the ordinary shares, investors have the best possible assurance that every effort will be made to ensure the prosperity of the company's business."

All the ordinary shares were taken by the vendors or other persons (not directors), with the exception of 367. None of the directors (other than the vendors) was ever placed on the register of members in respect of ordinary shares, and no such shares were ever allotted to any of those directors. The company being in liquidation, Romer J. held, upon an application by the liquidator, that the five directors (other than Bartholomew) were jointly and severally liable in respect of the 367 shares. This decision was not appealed from.

The liquidator sought to make Bartholomew also liable for the 367 ordinary shares, and obtained a balance order against him in respect of them. He applied to Wright J. to discharge this order.

Beyond the above statements in the prospectus there was no evidence of any agreement between him and the company that he should take, and that they should give him, any ordinary shares. On the contrary, he deposed that no such agreement had ever been entered into between himself and the company.

There was evidence that before the registration of the company a draft of the prospectus of the then intended company had been submitted to and discussed by the persons who afterwards became directors, and that the draft was settled and approved by them. Bartholomew said that the draft had been altered after he approved of it and before it was published, but he did not prove that any material alterations were made.

1898. July 19. *Grosvenor Woods, Q.C.*, and *Sheldon*, for the liquidator.

Haldane, Q.C., and *Gore-Browne*, for Bartholomew.

Whinney, and *T. L. Wilkinson*, for other directors.

WRIGHT J., after stating the facts, continued:—If the question had arisen between the directors and any one who had applied for and taken shares or debentures on the faith of the prospectus, there could be very little doubt that the directors would be held bound by everything contained in it, and that the company, who authorized it, would also be held bound. But the question arises between Mr. Bartholomew and the company, and the doubt is whether there is any representation or contract as between him and the company on which he can be held liable, or treated as a shareholder, for these ordinary shares. I have been unable to follow some of the arguments addressed to me. I do not say that they are ill founded either in fact or in law; I only say that I am unable to follow them. In particular, I do not agree that representations made to the public by the directors can have any operation in the nature of an estoppel as between the directors and the company. But at the same time I think there is a ground on which Mr. Bartholomew ought to be held liable, just as it has been repeatedly held that, although the articles of association of a company are not a contract between the company and any one else, but are merely a contract between the members of the company, yet, if the directors accept office on the footing of those articles and act upon them, they thereby—by so acting—make a contract embodying the terms of the articles. So I think that a contract may be found possibly to exist on

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the terms of the prospectus. It appears to me that, when the directors on October 28 put forth the prospectus as the company's prospectus, and acted as directors, being named as directors both in the articles of association and in the prospectus, they must be taken to have assented to act as directors on the terms set forth in the prospectus, and one of those terms was that they, the directors as a whole, would as a matter of contract undertake to take up the ordinary shares. No doubt they intended that the vendor directors, or some of the other directors who were specially interested, would do it; but I think they have entered into a contract by which they are bound to do it to the extent to which those shares had not been allotted to any one else. Whether the directors could have bound the company to offer them all the ordinary shares is quite a different matter, which I do not think it is necessary now to determine; but I think that it was perfectly competent to them to contract with the company that, if and so far as called upon by the company, they would take up the ordinary shares, and I think I ought to hold that there is evidence on which I must find that they did so.

One case has been cited which to some extent supports the conclusion to which I have come, namely, *Moore and De la Torre's Case* (1), although it is not exactly in point. I am told that Romer J., with regard to three of the directors who applied to him to remove them from the list of contributories, came to the same conclusion in substance, but I am unfortunately unable to learn on what ground he based his decision. I can only say that I trust I am not basing my decision on any ground inconsistent with his decision. If I knew the reasons which he assigned for it, I should govern my own decision accordingly.

Of course the directors cannot be held liable for any of the shares which were allotted to other persons.

F. E.

C. A. Bartholomew appealed. The appeal was heard on February 8, 1899.

(1) (1874) L. R. 18 Eq. 661.

Haldane, Q.C., and *Gore-Browne*, for the appellant. The appellant never contracted or agreed with the company to take, nor did the company ever agree to give him, either 367, or any other definite number of ordinary shares in the company; no ordinary shares were ever allotted to him while the company was a going concern, nor was he ever placed upon the register in respect of any.

The learned judge has treated the terms of the prospectus issued by the directors as affording evidence of a contract by the appellant that he should take and that the company should give him 367 ordinary shares. But upon the true construction of the prospectus it amounted to nothing more than the expression of an intention on the part of the directors to take, at some time or other, and in some proportions to be settled by themselves, such ordinary shares in the company as should not be taken by the vendors; and no definite contract of any kind can be evolved from this. Mere representations of intention cannot constitute a contract or alter legal rights: *Jorden* v. *Money* (1); *Maddison* v. *Alderson*. (2)

Grosvenor Woods, Q.C., and *Sheldon*, for the liquidator. The directors issued the prospectus by which they invited the public to subscribe for the preference shares and the debenture capital upon certain conditions, one of which was that the directors would take all the ordinary shares which were not taken by the vendors. This prospectus was not an afterthought: it was practically settled before the registration of the company, and the conditions contained in it must be taken to be part of the constitution of the company. The directors were bound to fulfil the condition that they should take all the ordinary shares not taken by the vendors: *Isaacs' Case* (3); *In re Hercynia Copper Co.* (4) It must be assumed that the directors had jointly and severally agreed to take all these shares, though they might arrange among themselves how many shares each of them should take: *Moore and De la Torre's Case*. (5) That case may perhaps be distinguishable from the present, because there

(1) (1854) 5 H. L. C. 185.
(2) (1883) 8 App. Cas. 467.
(3) [1892] 2 Ch. 158.
(4) [1894] 2 Ch. 403.
(5) L. R. 18 Eq. 661.

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the question arose between the promoters, who had issued a circular in the nature of a prospectus, and the other contributories, who had been induced to take shares on the faith of the statements contained in the circular.

But in *In re A. M. Wood's Ship's Woodite Protection Co.* (1) a similar question arose between a company in liquidation and its directors. Some reasonable meaning must be given to the words of the prospectus, and it can only mean that the directors are to take the shares. The representation was made by the company and the directors. It was acted upon by the company, when they issued preference shares and debenture capital on the faith of the statements contained in it, and the directors cannot now be heard to say that those statements were not true. The company were exposed to the risk of having to refund the money obtained from the preference shares and the debenture-holders, if they discovered that the statements in the prospectus were untrue. Suppose that A. and a firm of B. & Co. join in representing to C. that A. has a defined interest in the firm, and ask C. to join the firm and he joined the firm; could A. afterwards repudiate that representation, or could B. & Co. say that he had no interest in the firm? The present case is a stronger one, because here B. & Co. (that is the company) can only act through A. (the directors). The company could not dispute the representation put forward on their behalf, and an agent is bound to act in good faith towards his principal. None of the cases upon estoppel is inconsistent with this view.

But, if there is no estoppel, it may well be said that there was a contract by the directors to take the shares. If A. and B. together represent to C. that there is a contract between them, does not that amount to a contract? There is an assent of the two minds. This must be so a fortiori where B. (a company) cannot have an intention. In such a case their intention must be taken to be that which they say.

Whinney, for Watson. Under the circumstances the Court will assume that there was a contract between the company and the directors that they should take these shares. *Isaacs'*

(1) (1890) 2 Megone, 164.

Case (1) applies. Bartholomew was a promoter of the company, as well as a director. The evidence shews that he saw and approved of the prospectus before he signed the memorandum of association. It was present to his mind when he accepted the appointment of director that the condition of his doing so was that he was to be liable to take these shares, and this being so it is immaterial in what document the condition is to be found. The directors agreed to become directors on terms which were known to them. After they had become directors they formally approved of the prospectus, of which each of them had already approved, and the prospectus invited the public to become preference shareholders or debenture-holders upon the terms expressed in it. The public were told that their interests would be well protected, because the directors as ordinary shareholders could receive nothing until the preference shareholders and the debenture-holders had been paid. [He referred to *Hutchinson's Case.* (2)]

T. L. Wilkinson, for Wells and Colman.

LINDLEY M.R. It is not from any desire to relieve Mr. Bartholomew from any obligation which he may have contracted that I fail to agree with Wright J., because one would like to put these directors on the list of contributories if it were possible to do so. But we cannot do that unless we invent a contract for it, and we have no right to invent a contract in order to do what we may think would be fair.

Mr. Bartholomew complains that he has been placed on the list of contributories and ordered to pay calls on 367 shares in this company. We are told that he was one of the original directors of the company, and one of the promoters, and probably he was. While the company was a going company he was never placed on the register in respect of any ordinary shares, and there is no trace of any agreement between him and the company that he would take, or that the company would give him, any definite number of shares; nor was there in truth, if you look at the real transaction, any such agreement between him and the company. But there is a very important document

(1) [1892] 2 Ch. 158. (2) [1895] 1 Ch. 226.

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from which it is said that we ought to infer (that which I believe is contrary to the truth) that there was an agreement between him and the company that he should have 367 ordinary shares. That document is the prospectus of the company. The company was formed on October 4, 1893, and Mr. Whinney has stated (I do not doubt accurately) that the prospectus was framed before then and was sent by Mr. Bartholomew to Mr. Watson and approved of by him, as the prospectus of the then unformed company, as early as September, 1893. Now what did the language of the prospectus mean in September, 1893, when Mr. Bartholomew approved it? It meant that the directors would take the 1500 ordinary shares of 20*l.* each. That cannot by any possibility be turned into anything like an agreement with the company. At the most, it was an expression of an intention: "When the company is formed we the directors will enter into an agreement with the company to take those shares." That is the very outside of it. When the company was formed on October 4, 1893, Mr. Bartholomew became a director. He was nominated in the articles as one of the first directors, and he does not dispute that he did become a director. There may be a question hereafter whether he became liable to take his qualification shares. We have not considered that point, and I will say nothing more about it. I am referring now only to his alleged obligation to take 367 shares. On October 28 the directors met and Mr. Bartholomew was present. At that meeting the draft prospectus was approved and settled, and the secretary was instructed to place the same in the printer's hands. This, as I understand, is the prospectus which Mr. Bartholomew had previously sent to Mr. Watson in September, 1893. [His Lordship read the statements in the prospectus above quoted, and continued:—]

If we had to consider the effect of the prospectus with regard to a complaint made by a person who had taken shares in the company on the faith of those statements, we might possibly come to a conclusion advantageous to that person. But we have not now to consider anything of that kind. We have to consider whether these statements in the prospectus amount to satisfactory proof, not merely whether the document

is admissible in evidence, but whether it is satisfactory proof of an agreement between Mr. Bartholomew and the company that he should take, and that they should give him, 367 ordinary shares, that being the amount of the ordinary shares not allotted. Wright J. has come to the conclusion, upon the construction of this prospectus and the fact that it was issued by the directors at their meeting on October 28, 1893, that all the directors are jointly and severally liable for these 367 shares. He treated the prospectus, not only as evidence of an agreement, but as satisfactory proof of an agreement, between the directors and the company, that all the directors were bound to take these 367 shares. I am unable to come to that conclusion. It appears to me, in the first place, that, if the prospectus is evidence of any agreement between the directors and the company, the true construction of it is not that. I cannot possibly extract from its language a contract that all the directors shall jointly take all the shares which are unallotted. The true meaning, as I apprehend, is the same as it was before the company was formed, namely, that there was some intention on the part of the directors, not that they had contracted with the company or had made an offer to the company, but that some arrangement would be made with the company by which, if other people did not take these shares, they (the directors) would take them in some proportions which they would settle amongst themselves. There was nothing definite about it. So far from there being an agreement with the company, the prospectus was at the very outside evidence of an intention on the part of the directors that some agreement should be entered into which would be matter for consideration afterwards. One director might apply for some of the shares and another director for other shares. But to spell out of it an agreement between the company and the directors that the company would allot and that the directors would jointly take 367 shares, or that Mr. Bartholomew would take 367 shares, would be, in my judgment, not to infer an agreement in conformity with the intention of the parties, but to invent an agreement in order to catch a man who you might think had behaved shabbily. I

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cannot go to the same length as the learned judge did. I think that such an agreement as would alone justify us in putting Mr. Bartholomew on the list of contributories or making a call upon him in respect of the 367 shares cannot be fairly deduced from these materials. In my opinion, therefore, the appeal must be allowed.

RIGBY L.J. I am of the same opinion. The contention of the liquidator must be carried to this extent—that the company were bound to allot these shares to the directors. I can find no evidence of that. As a matter of fact we know that, outside the prospectus, there was no such agreement. When we are construing the prospectus it must be shewn that the company were bound. I cannot see any evidence that they were bound. The company went on for nearly three years, and such a thing was never suggested. I agree in the construction which the Master of the Rolls has put upon the prospectus, if it is to be treated as an agreement (I do not think it is). But on its construction it is certainly not an agreement that the directors will take all the shares not taken by the vendors. At the most, it is only an agreement that the shares will be taken up by some or other of the directors, and they could not all be fixed with the whole 367 shares. I do not think there is any estoppel in the matter, and I cannot see that in any view of the case it is possible to sustain the order of Wright J. that each of the directors must be placed on the list for the whole 367 shares.

VAUGHAN WILLIAMS L.J. I am of the same opinion. But as two learned judges have apparently arrived at the conclusion that these directors are all liable to be placed upon the list of contributories, I think perhaps it is better that I should state my own reasons. In my opinion, it is plain that these directors were never members of the company in respect of these shares —indeed, it is not suggested that they were. I think it is also plain that there was no contract by these directors to take these shares. There was nothing like a contract in form, but it is said that a contract may somehow or other be spelt out of

the prospectus. [His Lordship read the statements in the prospectus, and continued :—]

Now the first contention for the liquidator, as I understand it, was that a contract can be found there upon the principle of an estoppel. I entirely agree with Wright J. that no contract can possibly be found here upon the principle of an estoppel. If there were an estoppel, it must be an estoppel as between the directors and the company whose prospectus this was.

Then it is said that, if we cannot find a contract by estoppel, the statements in the prospectus are evidence of an agreement between the directors and the company. According to my view, these statements cannot be evidence of anything. As I understand the judgment of Wright J., it was based merely upon an application of the principle on which *Isaacs' Case* (1) was decided. But in that case there was an offer by the company to persons who should become directors. There was a statement of the terms upon which persons could become directors, and some persons, with those terms before them, chose to become directors, and the decision was only this—that by becoming directors they had accepted those terms, and had therefore contracted to take shares in accordance with those terms. There is nothing of that kind here, for there was no offer by the company which could be said to have been accepted by the directors by their becoming directors, because they were already directors at the time when the prospectus was issued. I understand Wright J. to suggest that the issuing of the prospectus is of itself evidence of an offer by the company of these shares, and an acceptance of them uno flatu by the directors at the moment when the prospectus was issued by them on behalf of the company. But that would involve saying that the company were bound to allot these shares to the directors and that the directors were bound to accept them; and it was not even suggested to us in the argument that such a state of things existed. It was not, and indeed it could not, be suggested that by reason of the issue of

(1) [1892] 2 Ch. 158.

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this prospectus the company ceased to be at liberty to deal with these shares. That being so, it was suggested, not that there was an immediate contract by the directors to take the shares, so that from that moment the directors became either shareholders or compellable to take the shares, but that by the issue of the prospectus there was a contract that the directors would at some future time take as many of the shares as should remain unallotted after the vendors had taken as many of them as they should choose to take (that they were intended to take some is plain from the prospectus), and after the company had allotted as many as they might think fit to the outside public. I cannot find any evidence of such a contract in the words of this prospectus; and if I had any hesitation in the matter, it would go far to remove it that this document is so vague and uncertain in its terms that no Court ought to endeavour to spell a contract out of it. In my judgment, Mr. Bartholomew is not liable as a contributory. In my opinion, he incurred no liability by reason of any estoppel, and there is no evidence that he ever contracted to take any shares.

Solicitors: *Ranger, Burton & Frost; G. A. King; Taylor, Hoare & Pilcher*; *Long & Gardiner.*

W. L. C.

COOPER *v.* BELSEY.

C. A.
1899
Feb. 14.

[1898 C. 1564.]

Settled Land—Tenant for Life—Undivided Share in Land—Power to Sell—Vendor and Purchaser—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 6–10; *s.* 19.

Where under a will land is devised in moieties and each moiety is separately settled by the will itself the tenant for life of one undivided moiety can sell his moiety under the powers of the Settled Land Act, 1882, without the concurrence of the person or persons entitled to or having the power or right of disposition over the other undivided moiety.

In re Collinge's Settled Estates, (1887) 36 Ch. D. 516, overruled.

Appeal from Romer J. dismissed.

APPEAL from Romer J.

William Cooper by his will, dated in 1847, devised certain freehold premises, No. 8, Queen's Street, Cheapside, to trustees upon trust to pay to his wife Mary Cooper one moiety of the rents and profits thereof during her life for her separate use, and after her decease upon trust to convey and assure the said moiety of the said premises unto the use of his four sons, William, Thomas, John, and Henry, in equal shares as tenants in common, their respective appointees, heirs or assigns absolutely, subject to certain provisions in favour of the issue of his said sons, and with a benefit of survivorship between them in default of issue; and as to the remaining moiety of the said freehold premises in trust to pay the rents and profits thereof to his daughter Mary Ann Cooper during her life for her separate use, and, after her decease, upon trust to settle, convey, and assure the said moiety of the said premises to such uses, upon and for such trusts, and in such manner for the benefit of any child or children or other issue of his said daughter born in her lifetime as she should appoint, and in default of and subject to such appointment to the use of such child or children of his said daughter as should live to attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, if more than one in equal

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shares as tenants in common, with a gift over in default of such children.

The testator died on January 12, 1850, and his widow Mary Cooper died on January 9, 1865.

In September, 1865, the moiety of the freehold premises by the will directed to be conveyed and assured after Mary Cooper's death to the testator's four sons was by their direction sold and conveyed to one George Hensman in fee.

On February 17, 1898, the testator's daughter Mary Ann Cooper put up for sale by auction under the Settled Land Acts the moiety of the said freehold premises whereof she was tenant for life under the settlement made by the will of the testator, and Charles Henry Belsey was declared the purchaser thereof, and signed an agreement for the completion of his purchase. An objection to the title was taken by the purchaser upon the ground that the decision of North J. in *In re Collinge's Settled Estates* (1) was a clear authority that, although the other moiety of the freehold hereditaments devised by the will of the testator was no longer in settlement, Mary Ann Cooper had no power to make a valid sale of the moiety of which she was tenant for life except by obtaining the concurrence of the owner of the other moiety in a sale of the entirety of the land, and that having regard to that decision the vendor could not make a good title.

In order to obtain the decision of the Court upon the question thus raised, the vendor brought an action against the purchaser for specific performance of the agreement for sale of February 17, 1898, and this action came on for hearing before Romer J. on July 26, 1898, when his Lordship considered that *In re Collinge's Settled Estates* (1) was distinguishable, and held that the vendor had made a good title to her one undivided moiety of the freehold premises in question, and could convey the same as tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, without the joinder or concurrence of any person entitled to or having power or right of disposition of or over the other undivided moiety.

The purchaser appealed.

(1) 36 Ch. D. 516.

Badcock, for the appellant. *In re Collinge's Settled Estates* (1) is exactly in point. In that case, as here, there were two settlements running side by side under the same deed, and the moiety comprised in one settlement had been sold and conveyed to a purchaser; and the decision is a distinct authority that in a case like the present the tenant for life of one undivided moiety cannot sell without the concurrence of the persons entitled to the other undivided moiety. But it appears clear, and it ought to be stated, that the attention of North J., who decided *In re Collinge's Settled Estates* (1), was not called to sub-s. 10 (i.) of s. 2 of the Settled Land Act, 1882, which enacts that "in this Act 'land' includes . . . . an undivided share in land." And certain of the text-writers have taken the view that the decision cannot be defended: Hood & Challis, 5th ed. p. 197. The consent of the owners of the other moiety could, it appears, be now obtained; but the question of law is a very important one, and it is highly desirable that it should be determined by the Court of Appeal.

G. Broke Freeman, for the vendor, was not called upon.

LINDLEY M.R. We are all liable to make an occasional slip, and it is quite obvious that one was made in *In re Collinge's Settled Estates* (1), and that the definition of "land" in sub-s. 10 (i.) of s. 2 of the Act of 1882 was not then brought to the attention of the Court. The appeal must be dismissed, and the costs will be as arranged.

RIGBY L.J. and VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Hunters & Haynes; G. H. C. Lea.*

(1) 36 Ch. D. 516.

W. W. K.

C. A.
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NORTH J.
July 21.

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1899
Feb. 9, 27.

In re PICKWORTH.
SNAITH *v.* PARKINSON.

[1898 P. 222.]

Will—Construction—Trust Moneys—Gift of Life Interest to A.—After Death of A. Direction to Pay and Divide Equally between two Persons—"And if either of them shall be then dead for the Survivor"—Death of both Legatees before Determination of Life Interest—Meaning of Words "Either" and "Survivor."

A testatrix gave residuary trust moneys upon trust to pay the interest to her sister Thirza during her life, and after her death to pay and divide the said trust moneys equally between the testatrix's two sisters Frances and Sarah, share and share alike, "and if either of my said sisters shall be then dead . . . . upon trust for the survivor of my said sisters absolutely":—

Held, by Lindley M.R. and Vaughan Williams L.J. (Rigby L.J. dissentiente), that the period of distribution was not the death of Sarah who died first, or of Frances who was the survivor of the two legatees, but the death of Thirza, to whom the life interest was given; and that both Sarah and Frances being dead at that time there was then no survivor, and the clear original gift to Sarah and Frances as tenants in common was not divested.

The decision of North J. affirmed.

White v. *Baker*, (1860) 2 D. F. & J. 55, discussed and distinguished.

Appeal from North J.

Maria Pickworth, by her will dated April 15, 1872, gave her residuary personal estate to trustees upon trusts for sale, conversion, payment of debts, and investment, and to pay the dividends or interest of the trust fund to her sister Thirza Pickworth during her life; and from and after her death the testatrix directed that her said trustees should "pay and divide the said trust moneys unto and equally between my two sisters Frances the wife of William Jones and Sarah Parkinson the widow of Charles Parkinson deceased share and share alike. And if either of my said sisters shall be then dead I declare that my said trustees shall stand possessed of the whole of the said trust moneys upon trust for the survivor of my said sisters absolutely."

The testatrix died on August 9, 1882, leaving her three

sisters, Thirza Pickworth, Sarah Parkinson, and Frances Jones, her surviving; and the will was duly proved.

Sarah Parkinson died on December 30, 1886; Frances Jones died on October 27, 1891; and Thirza Pickworth, who was entitled to the life interest in the fund, did not die until November 3, 1897.

The question then arose whether the legal personal representatives of Frances Jones, the survivor of the two legatees, were entitled to the whole of the residuary estate of the testatrix, or whether they and the legal personal representative of Sarah Parkinson were entitled thereto in equal shares; and this question came on for determination before North J. upon an originating summons taken out by the trustees and executors of Maria Pickworth against the executrix of Sarah Parkinson and the executors of Frances Jones.

The summons was heard before North J. on July 21, 1898.

Bramley, for the plaintiffs, stated the facts.

H. Terrell, Q.C., and *Tucker*, for the representative of Sarah Parkinson, contended that she was entitled to half the fund, the event on which it was to go over not having happened: *Browne* v. *Lord Kenyon* (1); *White* v. *Baker* (2); *Harrison* v. *Foreman*. (3)

Johnston Edwards, for the representatives of Frances Jones, claimed the whole fund on the ground that she was the survivor: *Scurfield* v. *Howes*. (4)

NORTH J. I am of opinion that the meaning of the will is reasonably clear, and am glad that some cases have been found which are consistent with what seems to me to be common sense. The words are very simple. [His Lordship read the clause in the will, and continued:—]

The sister Thirza is during her life preferred to both Frances and Sarah. After the death of Thirza the fund is to be divided between the other two sisters equally, share and share alike. The testatrix did not think fit to provide for

(1) (1818) 3 Madd. 410.
(2) 2 D. F. & J. 55.
(3) (1800) 5 Ves. 207.
(4) (1789) 3 Bro. C. C. 90.

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PICKWORTH, *In re.* SNAITH *v.* PARKINSON.

North J.

the case of both of them being dead before Thirza, but it did occur to her that one of them might be dead before Thirza. So she proceeds, after the direction to pay and divide on the death of Thirza, "and if either of my said sisters shall be then dead"—when dead? The period of distribution is when Thirza has died and her life interest has come to an end, and the testatrix says: "If either of my said sisters shall be then dead I declare that my trustees shall stand possessed of the whole of the trust moneys upon trust for the survivor of my said sisters absolutely." If she is contemplating one sister being dead and the other being alive, the gift to the survivor of the two sisters absolutely is perfectly clear. There would be a person living who could enjoy the whole, and that person is to take the whole, instead of dividing it with the sister who has died after the testatrix but before the tenant for life. The word "survivor" there clearly, in my opinion, points to a particular time. The period of distribution is generally meant in such a case. But in the present case that is emphasised by its connection with the words "then dead." "If either of them is then dead then upon trust for the survivor"—the survivor who is living when Thirza dies.

It is said that it means that, unless they both happen to be alive at that time, in which case they are to take equally, the survivor of the two is to take, although both of them have died in the lifetime of the tenant for life. I do not see any sense in that. The period clearly pointed to by the words "as shall be then dead" is the death of Thirza; and, although no doubt the testatrix might have said that, unless they are both living when Thirza dies, then whichever of the two sisters survives the other shall take the whole fund, and that would be intelligible; yet it does not seem a gift very likely to be made.

In the present case I have no doubt that what was contemplated by the testatrix was that both the sisters would be alive, or that one of them would be alive and the other dead, at the death of Thirza, and in the event of one of them being then alive she is to take the fund because she survives Thirza, not because she survives her sister; and that is really the whole point to be considered—what is the period of survivorship

referred to in the will? Is it the surviving the tenant for life, or is it the surviving the sister who dies first? Primâ facie it must mean the one who is living at the period of distribution, and that must be the construction unless one can find something pointing to a different construction.

As regards the cases which have been referred to, *Browne* v. *Lord Kenyon* (1) seems to me more like the present case than any of the others. The marginal note is: "Bequest to A. for life, and afterwards to B., but if he should be then dead," (which is not so strong as the present case) "to C. and D. in equal shares, or the whole to the survivor of them." There it was held that, both C. and D. having died before the tenant for life, the gift did not take effect in favour of that one of them who had survived the other. The judgment seems to me to be exactly in point. In *White* v. *Baker* (2), *Browne* v. *Lord Kenyon* (1) was cited; the Lord Chancellor referred to it, and it is clear that he approved of it, because he pointed out the distinction between it and the case which he had to decide; and both Knight Bruce L.J. and Turner L.J. abstained from saying a single word which either expressly or by implication found fault with *Browne* v. *Lord Kenyon*. (1) In *White* v. *Baker* (2) there was a trust for the testator's widow for life, and after her death for A. and B. in equal shares, "and in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund unto the survivor of them the said A. and B., his executors, administrators, or assigns." A. died in the lifetime of the widow. The Court considered that the words referred, not to the death of the tenant for life—not to the period of distribution—but to the death of A. or B. in the lifetime of the tenant for life; and Turner L.J. thus pointed out the reason for it, saying (3): "Where there is a bequest to A. for life and after his death to B. and C. or the survivor of them, some meaning must of course be attached to the words 'the survivor.' They may refer to any one of three events—to one of the persons named surviving the other, to one of them only surviving the

(1) 3 Madd. 410. (2) 2 D. F. & J. 55.
(3) 2 D. F. & J. 64.

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testator, or to one of them only surviving the tenant for life, and in the absence of any indication to the contrary they are taken to refer to the latter event as being the more probable one to have been referred to." That is, the construction which I am putting upon the present will is the right one, unless there are some words to shew that that is not what is intended. That is what Turner L.J. calls "the more probable meaning to have been referred to." "But" (he continued) "where, as in the present case, the bequest is to A. for life, and after his death to B. and C., and in case either of them dies in the lifetime of A. the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other, and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used." Then he went on to say that the addition to the gift to the survivor of the words "his executors, administrators, or assigns," made the case more strong in favour of the appellant, though he should have come to the same conclusion without those words.

In the present case the survivorship is, I think, clearly intended to be at the time which is referred to by the words "then dead"—that is, at the death of the tenant for life.

Harrison v. *Foreman* (1) is another strong case, but I do not think it necessary to refer to it in detail.

Again, in *Scurfield* v. *Howes* (2) the gift was, after the decease of Susanna Homer, "To the son and daughter of Susanna Homer, by her former husband Mr. Wright, equally between them, share and share alike; but, if either of them should die before the decease of their mother, the whole to the survivor." There again the question was, what was the time meant by the word "survivor"? And it was held to be the time when there was a survivor by reason of the death of the other, not the time when that one who was the survivor obtained a vested interest in possession by the arrival of the period of distribution.

In the present case I think it is clear that, if either Frances

(1) 5 Ves. 207. (2) 3 Bro. C. C. 90.

or Sarah was dead at the time of Thirza's death, the fund was to go to the survivor of them. But in the result there was no survivor at that time, for they were both dead, and therefore the clear original gift to the two as tenants in common was not divested.

W. L. C.

C. A.

The legal personal representatives of Frances Jones appealed. The appeal was heard on February 9, 1899.

Swinfen Eady, Q.C., and *Johnston Edwards*, for the appellants. The survivor of two persons means the longest liver of the two, and here the qualification of the one legatee who is to take absolutely is the surviving of the other of the two legatees, and not the surviving of the tenant for life. Accordingly, upon the death of Mrs. Sarah Parkinson, Mrs. Frances Jones acquired an absolute indefeasible interest in the whole fund given to the two legatees subject only to the life interest of Thirza Pickworth: *Scurfield* v. *Howes* (1); *White* v. *Baker* (2); *Harrison* v. *Foreman* (3); *Browne* v. *Lord Kenyon.* (4)

Tucker (with him *H. Terrell, Q.C.*), for the respondents, the legal personal representatives of Sarah Parkinson. The time of the survivorship under the words of this will is the time of the death of the person entitled to the life interest, which time is the period of distribution. The gift over took effect only if "either" of the two legatees was dead at that time. "Either" cannot be read to mean "both." This gift over did not take effect, because the legatees were both dead, and there was no survivor of them at that time. Accordingly, the original gift to the two legatees as tenants in common is not divested, and the representatives of Mrs. Sarah Parkinson and Mrs. Frances Jones are entitled to the fund in equal shares: *Browne* v. *Lord Kenyon* (4); *Sturgess* v. *Pearson.* (5)

Bramley, for the trustees.

Johnston Edwards, in reply.

Cur. adv. vult.

(1) 3 Bro. C. C. 90.
(2) 2 D. F. & J. 55.
(3) 5 Ves. 207.
(4) 3 Madd. 410.
(5) (1819) 4 Madd. 411.

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PICKWORTH, *In re.* SNAITH *v.* PARKINSON.

Feb. 27. LINDLEY M.R. This is an appeal from a decision of North J. on a very short will, and the question is as to the meaning of one clause in it relating to a survivorship between two sisters. [His Lordship then stated the terms of the will, and continued:—]

Now, there is no doubt at all that under that first gift the two sisters, Mrs. Jones and Mrs. Parkinson, took vested interests. That is the legal effect of that clause, although it is pretty obvious that if we were to look into the mind of the testatrix when she said "upon trust to pay and divide" she took it for granted that the two persons between whom that money was to be paid and divided would be both alive at the death of the tenant for life. That is not the legal effect of it; but I do not think there is much doubt that that is what was in her mind—she assumed it would be so. What has happened is that both died in the lifetime of the tenant for life. The question is whether there is a gift over in the event of that happening. There is no gift over at all except that which runs thus: "If either of my said sisters shall be then dead, I declare that my said trustees shall stand possessed of the whole of the said trust moneys upon trust for the survivor of my said sisters absolutely." There is no doubt at all that the meaning of "the survivor of my said sisters" is the survivor of the two, Mrs. Parkinson and Mrs. Jones—there is no question at all about that. But then the expression is, "if either of my said sisters shall be then dead." Does that cover the event which has happened of both being dead? North J. has thought not, and I think he is right. I do not think it is according to the ordinary use of language to say that the expression "if either of my said sisters shall be then dead" means if both of them shall be then dead. "Either" is taken in the ordinary sense as one of the two and as not, in any sense, meaning both. I do not think it is the natural meaning of the expression. "Either" may mean both, as when you say "on either side of the road there is a public-house"—that means on each side. Especially in a negative sentence it is pretty plain that "either" means or includes both in the sense of each; but I do not think that the expression "if either of my said sisters shall be then

dead" can be taken as expressing in ordinary English the contingency of both being dead. To my mind the words "then dead" are all important. They direct attention to the period to which you are to look—"if either shall be then dead." That appears to me to turn the case in favour of the interpretation put upon it by North J. I am aware there are some cases which look the other way, especially *White* v. *Baker* (1), and I have considered them. The language in *White* v. *Baker* (1) to my mind differs sensibly from the language here. In that case there was a gift over in case of the death of either "in the lifetime of my wife," not pointing attention so markedly as the testatrix has done here to the period of time to which you are confined—"if either is dead." Besides which, there was the expression "in trust to the survivor, his executors, administrators, or assigns"—language which I attach more importance to than Turner L.J. did in that case. One is bound to deal with this case as it stands, and, giving the best attention to it, I must say I think that North J. was right. The effect, therefore, is that the previous gift vesting the residue in these two sisters, Mrs. Jones and Mrs. Parkinson, has not been divested in the events which have happened, and therefore the appeal fails.

RIGBY L.J. In this case I have found myself unable to arrive at the construction adopted by North J., by the Master of the Rolls, and, as I understand, by Vaughan Williams L.J., thinking as I do that the primâ facie meaning of the words used point to a different conclusion, and that there is no reason, and consequently no justification; for departing from that primâ facie meaning.

The testatrix directs her trustees to stand possessed of her residuary trust moneys upon trust to invest, with power to vary the securities, and to pay the dividends or interest to her sister Thirza during her life, and, after her decease, she directs that her said trustees shall "pay and divide" the said trust moneys unto and equally between her two sisters, whom she describes, share and share alike. Pausing there, it cannot be

(1) 2 D. F. & J. 55.

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denied that the testatrix carries her mind to the period when the trust moneys will be set free by the death of the tenant for life, and treats the sisters, so far as the language goes, as if they would be capable of receiving payment and a divisible share of the trust moneys.

Assuming them for the moment to be both in existence at the death of the tenant for life, it is now settled that such a gift, consisting only of a direction to pay and divide—in a case like the present, where the postponement of the division is fully accounted for by the existence of a prior interest and has nothing to do with any matter personal to the beneficiaries—will not postpone the vesting of the gifts to them, and must not be treated as involving a condition that the beneficiaries shall be living at the death of the tenant for life. And, in obedience to that canon of construction, we have to treat the shares of the two sisters as vested shares. This interpretation, however, involves, on good grounds no doubt, some departure from the literal interpretation of the will so far as it makes the period of vesting a different period from that of payment and division. It is not because of the direction to pay and divide, but in spite of it, that the rule applies.

The testatrix then proceeds to deal with a particular hypothesis, and makes a different disposition of the trust moneys in a certain event—"if either of my sisters be then dead." What is the meaning of this? If "either" could be read as equivalent to "only one," the contingency on which the subsequent provision was to take effect did not arise, and we are not concerned with the construction of the gift which follows. But such a construction of the pronoun "either" would in my opinion be an absolute novelty. Originally "either" had much of the meaning of "both." For some centuries, however, its normal meaning has been "one or other." See Murray's "Oxford English Dictionary." Certainly that is its primâ facie meaning at the present time. I have not been able to find even a single instance of so complete a departure from the original meaning as would make it the contradictory of both. Giving the word what I hold to be its correct meaning, it follows that on the death of the first dying of the two sisters the contingency on

which the subsequent disposition depended became a certainty, and we have only to ascertain what that disposition means.

The first thing to observe is that the disposition is expressed in a new form. We have no longer to deal with words like "pay and divide," though the adverb "then" carries us forward to the time of the tenant for life's death just as those words did. The testatrix declares that the trustees are to "stand possessed of the whole of the trust moneys." Why should there be this change of language? One obvious answer would be that, under the changed circumstances arising out of the death during her lifetime of one at any rate of the two sisters, the testatrix did not mean her disposition to depend at all upon the contingency of survivorship at her death. She dissociates the new disposition from the previous words of gift after the decease of the tenant for life, and goes back to the words "stand possessed" with which she began. The ascertainment of the object of the new trust is contained in the words "Upon trust for the survivor of my said sisters absolutely." What is the meaning of the word "absolutely"? If an independent meaning can be given to it, it must be "unconditionally."

I say this because to hold that it points only to the amount of interest taken is really to deprive it of all independent meaning whatever. The words "the whole of the trust moneys" fully and entirely express this meaning.

On the other hand, the disposition in favour of the two sisters share and share alike was not absolute, but depended, certainly, upon a condition or contingency, whatever that condition or contingency might be.

I think that the obvious primâ facie meaning is this. The present gift is to be, unlike the former one, free from any condition, including (in my judgment) any implied condition of the beneficiary being alive at the death of the tenant for life. We have then to deal with the description "the survivor of my said sisters."

Here for the first time we are concerned with a word which has caused perhaps more difficulty in the interpretation of wills than any other word in the language. But the difficulties which

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arise are minimised by keeping the mind free from the intrusion of unnecessary hypothesis when the word as used can be interpreted according to its literal meaning in the phrase where it is used. Now here there can, I think, be no doubt that the word "survivor" is equivalent, if we leave out all extraneous considerations, to "longest liver"; and if that primâ facie meaning is given to it no difficulty remains. There can be no doubt that in this will that meaning is included. Can a further meaning be included? The construction suggested is that in the same phrase it includes two meanings, and not one: first, the survivorship as between the sisters: and, secondly, a survivorship as between the object of the gift and the tenant for life. The inclusion of the second meaning seems to me both arbitrary and unnecessary, and therefore not permissible. It introduces a condition into a gift which is intended to be absolute, and thereby deprives the word "absolutely" of any possible effect.

So far I have dealt only with the primâ facie meaning of the words, and in doing so I do not think that I have lost sight of any canon of construction which ought to guide us.

It is permissible to refer as authorities to any decision on other wills not expressed in exactly the same language, only so far as they illustrate a principle. I think that the grounds of decision in *White* v. *Baker* (1), particularly as set forth in the judgment of Turner L.J., supply us with such a principle. He proceeds first to find out the plain meaning of the word "survivor" in the will before him in the sentence in which it is used independently of any presumption in favour of its being referred to the period of distribution, and then asks whether the context is so much opposed to the plain meaning of the words used as to override that meaning. This appears to me to be the sound mode of procedure, and I have endeavoured to follow it. The plain meaning of "survivor" as here used is, I think, "longest liver," and so far from the context being opposed to that plain meaning it seems to me to corroborate it. When I add that *Scurfield* v. *Howes* (2) is affirmed by the Court of Appeal in *White* v. *Baker* (1) as a right decision, and that the apparently

(1) 2 D. F. & J. 55. (2) 3 Bro. C. C. 90.

inconsistent decision in *Browne* v. *Lord Kenyon* (1) is explained as depending upon a context entirely different from anything in the case of *White* v. *Baker* (2), or in the present case, I have said all that I think is necessary as to the previous decisions.

VAUGHAN WILLIAMS L.J. I agree in the view of the Master of the Rolls. I also agree in particular that there can be no doubt that those words, "and from and immediately after her decease I direct that my said trustees shall pay and divide the said trust moneys unto and equally between my two sisters Frances and Sarah share and share alike," are words which give to those two sisters vested estates. But I do wish to say that, although I have not the slightest doubt that that is the proper construction here, my mind always rather recoils from basing such a conclusion upon any canon of construction, because I think it is most unfortunate if one ever recognises that there is in force a canon of construction which compels one to do violence to the words of the will; and in the particular case here, if I did not feel that the whole of the terms of the will compelled one to do the violence one has to do to those words to arrive at the conclusion, I do not think the mere fact of the existence of the canon of construction would compel me to that conclusion. That one has to do some violence to the words of the will, and the probable intention of the testatrix to be inferred therefrom, I do not think there can be any doubt. I think, taking the words of the will as a whole, one cannot avoid the conclusion of these being vested estates. Now, with regard to what we have to decide here, I base my judgment upon the use of the word "then" in this contingent divesting clause. "If either of my said sisters shall be then dead I declare that my said trustees shall stand possessed of the whole of the said trust moneys upon trust for the survivor of my said sisters absolutely." I think that the word "then" qualifies not only the death which is spoken of, but also the survivorship that is spoken of, and determines the time at which one is bound to look for one and the other; and, having regard to

(1) 3 Madd. 410. (2) 2 D. F. & J. 55.

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subsequent decisions, and in particular to certain decisions of Lord Hatherley's when he was Vice-Chancellor Wood, I think that there is a good deal in the judgments in *White* v. *Baker* (1) which cannot be said to have been universally accepted afterwards. But as to so much of the judgment as lays down the canon that you must look at the will itself to construe the word "survivor," and construe it, not according to any abstract meaning, but according to what appears to be the meaning taking the will as a whole, I agree entirely, and I think in delivering the judgment which I am now delivering that I am following that canon of construction, and it is because of the words collocated with "survivor" here, and in particular the word "then," which shews us the time which is to be looked at, that I have come to the conclusion at which I have arrived, that as both sisters died in the lifetime of Thirza, before the time which is pointed out as being the crucial time, there has been no survivorship within the meaning of the word "survivor" in this will.

I only wish, that being the basis of my judgment, to say one word about the meaning of the word "either." I do not myself quite accept the proposition, however high authority there may be for it, that the word "either," in its original meaning, was a conjunctive word, or was a word which imported "both." I think if you have any doubt about the matter you have only to look at other languages, whether ancient or modern, to satisfy yourself that the meaning of the word "either" when used as "both," as in the example that the Master of the Rolls just gave, "On either side of the road," is an imported and subsidiary meaning, and not the primary meaning of the word. But I shall assume for the purpose of what I am going to say that the word "either" will equally bear either interpretation. Then one has to see which it means here; and I think it is tolerably safe to say that where a subjunctive clause introduced by the word "either" is followed by a dependent clause, which treats one of the two which are referred to separately from the other, it is very difficult, if not impossible, to find a single example in which

(1) 2 D. F. & J. 55.

the word "either" has ever been used to import both. I do not wish to say more upon this subject, because it is a question rather of grammar than of law, but merely to point, as an illustration of what I mean, to the well-known passage from the "Beggar's Opera":—

> "How happy could I be with either
> Were t'other dear charmer away;
> But now you both tease me together,
> To neither a word will I say."

However possible it might be, if you left out the last three lines, to treat the word "either" as meaning both, the real reason why you cannot treat it as meaning both in that sentence is, not only the obvious meaning of Captain Macheath when he used the words, but because it comes within the rule that I have stated that you find in the predicate which is applied to this subject that the two are treated in opposition and separately, and when that is so you ought not in the subject part of the sentence to treat the word "either" as meaning "both."

LINDLEY M.R. The appeal will be dismissed with costs.

Solicitors: *Collisson & Prichard; Debenham & Walker.*

W. W. K.

C. A. 1899 Jan. 31; Feb. 3; March 7.

LORD HASTINGS *v.* NORTH EASTERN RAILWAY COMPANY.

[1897 H. 1564.]

Landowner—Railway Company—Agreement for Lease—Executory Instrument—Construction—Ancient Document—Contemporaneous Usage or Interpretation—Mistake—Way-leave—Incorporeal Hereditament—Royalty—Rent—"Assigns"—Lease—Reversioner—Privity of Estate—32 *Hen.* 8, *c.* 34, *s.* 1.

By an agreement under seal dated in 1854, and made between H., the owner in fee of land, and a railway company, while a bill—which subsequently became an Act—was before Parliament to enable the company to construct certain railways intended to pass to a great extent over H.'s land, it was agreed that H. should, immediately after the passing of the bill, grant to the company, by lease in the form set out verbatim in the agreement, a "way-leave" over his land, with the right to make and use the railways thereon. The form of lease so embodied in the agreement purported to grant to the company a way-leave and right to make and use the railways, or such parts thereof as were to pass over H.'s land, for the term of 1000 years, the company paying to H., "his heirs or assigns," a specified rent on coal carried over "any part of the railways comprehended in the" special Act to Port B. The form of lease gave H., "his heirs or assigns," powers of distress and entry for non-payment of rent, and contained a covenant by the company with H., "his heirs and assigns," to pay the rent to him, "his heirs or assigns." No formal lease was ever executed, but the company entered on H.'s land and constructed the railways. One of them, the "M. branch," partly crossed H.'s land, and coal was carried over it to Port B. For upwards of forty years from the date of the agreement rent was paid by the company for coal carried over this branch so far only as it crossed H.'s land, the parties acting throughout on the assumption that under the agreement no rent was payable for coal not carried over H.'s land.

In an action brought by H.'s successor in title to the land against the company claiming that, according to the true construction of the agreement, rent was payable for coal passing over any part of the M. branch to Port B., whether it crossed his land or not:—

Held, (1.) that the agreement with the embodied form of lease was not an executory instrument, but must be construed as an agreement, complete in all its terms, for a lease of a way-leave for 1000 years over H.'s land; (2.) that the agreement could not be regarded as an ancient document capable of being construed by the light of contemporaneous usage, but must be construed according to its literal meaning, namely, that rent was payable for coal carried over any part of the M. branch to Port B., whether it crossed H.'s land or not; (3.) that the way-leave granted was

an incorporeal hereditament annexed to the land in the hands of H. or his successors in title; and (4.) that the rent, whether for coal carried over H.'s land or not, must be regarded as payable in respect of the land leased, and was consequently payable to the plaintiff as the owner of the reversion within 32 Hen. 8, c. 34, s. 1, and not to H.'s legal personal representative, there being sufficient privity of estate between the owners of the land over which the way-leave was granted and the company to enable such owners to sue the company on its covenant.

Decision of Byrne J. affirmed.

APPEAL by the defendants from the decision of Byrne J. (1).

By the indenture of May 18, 1854 (referred to in the former report), made between Jacob, Lord Hastings of the one part and the Blyth and Tyne Railway Company of the other part, after a reference to the Blyth and Tyne Railway Act, 1852, and reciting that a bill—intended to be called the "Blyth and Tyne Consolidation and Extension Act, 1854"—was pending in Parliament for the purpose of, amongst other things, enabling the company to continue and maintain, or make, complete, and maintain certain specified branch railways, one of which was called the "Morpeth Branch," and the works connected therewith; and also reciting that "the said railways and works are intended to pass and to be made to a great extent in, upon and through certain lands belonging to the said Lord Hastings": It was witnessed that the said Lord Hastings, "so far as relates to the acts and deeds by him his heirs and assigns to be observed and performed," did thereby "for himself and them covenant with the said company and their assigns," and the company thereby covenanted with him, "his heirs and assigns," that, immediately after the passing of the said bill into law, the said Lord Hastings, his heirs or assigns, would by indenture make, and the said company would thereby then accept and take, "a grant of way-leave and right and liberty of way and passage in, through, over and along such portion of the lands of the said Lord Hastings as thereinafter mentioned or referred to," which indenture should be as follows: then followed verbatim the form of indenture referred to, whereby it was expressed that the said Lord Hastings granted to the company and their assigns full way-leave or right of way and liberty, power and

(1) [1898] 2 Ch. 674.

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authority to and for the company and their assigns to make and construct the following railways and works—a blank being left for describing them—or such parts thereof as were to pass or be made through or in the lands of the said Lord Hastings, and which last-mentioned parts thereof were thereinafter called and intended by the expression "the said railways," upon the lands of the said Lord Hastings, and to enter upon and use the said railways in, through, over and along the said lands of the said Lord Hastings, to hold unto the company for the term of 1000 years from May Day, 1845, "Yielding and paying yearly and every year during the said term"—among other rents—"on coals, coke, culm and cinders conveyed over and along any part of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extension Act, 1854, and which shall be shipped at the port of Blyth (other than such coals, coke, culm and cinders as are comprehended in the reservation of rent next hereinafter contained) the sum of 3*s.* per ten."

The form of lease gave Lord Hastings, "his heirs or assigns," full powers of distress and entry in case of non-payment of any of the various rents reserved, and also contained a covenant by the company with Lord Hastings, "his heirs and assigns," to pay the rents to him, "his heirs or assigns."

The bill referred to in the indenture of May 18, 1854, was duly passed and became "The Blyth and Tyne Railway Consolidation and Extension Act, 1854," being the Act of that title referred to in the above-mentioned form of lease.

By the North Eastern Railway (Blyth and Tyne Transfer) Act, 1874, the Blyth and Tyne Railway Company was dissolved and their undertaking transferred to the defendants, the North Eastern Railway Company, but subject to all existing contracts and obligations affecting the same. The Blyth Company on obtaining their special Act entered on Lord Hastings' land and constructed the railways referred to in the indenture of May 18, 1854, including the Morpeth branch, which communicated with the port of Blyth. This branch passed partly over lands belonging to Jacob, Lord Hastings, and partly over lands of other persons. Jacob, Lord Hastings, died several years ago, having made a will by which he appointed executors:

his real estate was devised in strict settlement, and was now vested in the present Lord Hastings, the plaintiff.

No formal lease was ever granted to the Blyth Company or their successors as provided for by the deed or agreement of May 18, 1854; but until 1895, the Blyth Company and the defendants, the North Eastern Company, their successors, and Jacob, Lord Hastings, and his successor, the plaintiff, acted under the agreement exactly as if a formal lease had been granted, and the stipulated rents were paid for all coals, &c., carried over the railways mentioned in the agreement, including the Morpeth branch. The rent of 3*s.* per ten however paid to Jacob, Lord Hastings, and his successor in respect of the Morpeth branch was paid only for coals, &c., carried to the port of Blyth over that portion of the branch that crossed Lord Hastings' land, and not for coals, &c., that were not carried over Lord Hastings' land, the parties acting uniformly on the belief or the assumption that under the agreement rent was intended to be paid only for coals, &c., passing over Lord Hastings' land. In 1895 the defendants, the North Eastern Company, opened a new line of railway to the port of Blyth under powers contained in a special Act of 1893, and this railway tapped the Morpeth branch at a place called Bedlington, between Morpeth and the point at which the branch entered on Lord Hastings' land, the company being thus enabled to convey coals from the Bedlington colliery over a piece of the Morpeth branch, and so on to the new line to the port of Blyth for shipment without crossing Lord Hastings' land at all. Accordingly they refused to recognise the right of the plaintiff to any rent whatever for coals carried over that portion of the Morpeth branch used by them. The plaintiff, however, contended that, upon the true construction of the agreement, rent was payable for coals carried over any part of the railways therein referred to, whether they wholly or only partially crossed his lands or not. Hence the present action. Upon the question of construction it was argued at the trial before Byrne J. that the agreement, the embodied lease and the Act of 1854, ought, under the doctrine of contemporaneous usage, to be construed according to the meaning uniformly

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adopted and acted upon by the parties until the present dispute arose, and the argument on that occasion proceeded exclusively upon the question of construction.

Byrne J., in delivering a considered judgment on June 27, 1898, came to the conclusion, upon the construction of the agreement, the embodied form of lease, and the special Act of 1854, that the doctrine as to interpreting old deeds by the acts of the parties, did not apply to the documents in question, they not being "ancient deeds" in the ordinary sense, and that the language of the documents must be followed literally. He accordingly gave judgment for the plaintiff, declaring that he was entitled to a rent of 3*s.* per ten on all coals, &c., conveyed over and along any part of the railways comprehended in the special Act of 1854, including the Morpeth branch, and shipped at the port of Blyth, whether any part of those railways crossed his land or not; and ordering an account, upon the footing of that declaration, of all such coals, &c., for six years prior to the issue of the writ, and payment by the defendants to the plaintiff of the amount certified to be due on taking such account, with costs.

After his Lordship had delivered judgment, counsel for the defendants raised the point, which had been merely suggested in the previous argument, that the plaintiff had not sufficiently made out his title as the proper person to receive the rent now ordered to be paid, and contended that the legal personal representatives of Jacob, Lord Hastings, were the proper persons to sue for and receive it. His Lordship thereupon ordered the action to be restored to the paper for argument on this point, and directed that the judgment should not be drawn up in the meantime.

The case then came on for further argument on that point, as already reported. (1)

On July 7, 1898, Byrne J. delivered the further considered judgment as already reported below, and directed the final judgment to be drawn up in the form above stated.

The defendants appealed.

The main questions raised on the appeal were—(1.) whether

(1) [1898] 2 Ch. 674.

the agreement should be construed literally—that is, as imposing a rent on all coals, &c., passing over any of the railways therein referred to, whether such lands crossed Lord Hastings' land or not, or whether it should be construed according to the meaning given to it and acted upon by the parties thereto for upwards of forty years—that is, as imposing a rent only on such coals, &c., as went over Lord Hastings' land; and (2.) whether the action should have been brought by the legal personal representatives of Jacob, Lord Hastings, and not by the present plaintiff, his successor in title to the land and the owner of the reversion on the lease.

In the course of the argument on the appeal the second point was abandoned by the defendants.

Swinfen Eady, Q.C., *Astbury, Q.C.*, and *Mackarness*, for the defendants. In considering what should be the proper meaning to be attributed to the agreement of May 18, 1854, a document which has been acted upon for nearly forty-five years, we ask the Court to apply the doctrine applicable to the construction of an ancient document, namely, that where there is an ambiguity, evidence of the surrounding circumstances at the time the deed or instrument was executed and of contemporaneous usage, or "contemporaneous interpretation" by the parties, is admissible: *Wadley* v. *Bayliss* (1), cited in Taylor on Evidence, 9th ed. § 1205, p. 791; Elphinstone on Interpretation of Deeds, p. 66; *Clyde Navigation Trustees* v. *Laird* (2); *Reg.* v. *Vestry of St. Mary, Islington.* (3)

[VAUGHAN WILLIAMS L.J. There can be no doubt that contemporaneous usage may be resorted to for the purpose of explaining any uncertainty or ambiguity in an ancient grant; but then there must be "uncertainty or ambiguity": *Doe* v. *Beviss.* (4) I do not see any "uncertainty or ambiguity" in this agreement.]

For upwards of forty years the parties to it understood it to mean what, if read literally, it does not mean: there is,

(1) (1814) 5 Taunt. 752.
(2) (1883) 8 App. Cas. 658, 670, 673.
(3) (1890) 25 Q. B. D. 523, 527.
(4) (1849) 7 C. B. 456, 504–5, 511.

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therefore, "uncertainty and ambiguity" in it, and it should be read according to the meaning the parties themselves attributed to it. Such usage as constitutes "contemporanea expositio" is admissible to explain a document inter partes, though not for construing a statute: *Clyde Navigation Trustees* v. *Laird.* (1) The agreement should be regarded as an executory instrument, containing merely heads of arrangement, and intended to be followed by a document shewing the position of the parties with greater accuracy and detail. As to the point that the proper parties to sue are the legal personal representatives of Jacob, Lord Hastings, we do not propose to pursue it further.

Cozens-Hardy, Q.C., *Eve, Q.C.*, and *G. Henderson*, for the plaintiff. The doctrine as to executory instruments does not apply to such an agreement as this, which is perfectly clear and precise in all its terms, leaving nothing to be provided for afterwards. There is no ambiguity about this agreement, and therefore the cases cited do not apply. It has long been settled that extraneous evidence is not admissible to explain an unambiguous written document inter partes: *Clifton* v. *Walmesley.* (2)

Wadley v. *Bayliss* (3) was the case of a statement accompanied by an act against interest; being against interest it was held admissible, but that does not come near the present case.

Reg. v. *Vestry of St. Mary, Islington* (4), only decided that a letter or precept given by the churchwardens of a parish was a sufficient certificate within s. 18 of the Burials Act, 1855, and has no application to this case. This agreement had a statutory effect; it depended for its efficacy on the special Act of 1854. It has never been decided that, in construing a modern Act, evidence of contemporaneous usage is admissible. So to hold would be contrary to what was said by Lords Blackburn and Watson in *Clyde Navigation Trustees* v. *Laird* (1), who enunciated principles inconsistent with the defendants' contention. In the case of a deed, if it can be construed without any reference to contemporaneous usage, the Court cannot

(1) 8 App. Cas. 658, 670, 673.
(2) (1794) 5 T. R. 564.
(3) 5 Taunt. 752.
(4) 25 Q. B. D. 523.

look at that usage at all. Where you have, as in this case, a deed only some forty-four years old, there is no authority for holding that you must construe it otherwise than according to its actual and literal meaning. This agreement is not in any way an executory instrument. Taking the form of lease as embodied in it, it is complete in all its terms, and leaves nothing to be provided for afterwards.

Swinfen Eady, Q.C., in reply.

Cur. adv. vult.

March 7. LINDLEY M.R., after noticing the contentions of the defendants, the appellants, that a literal interpretation of the agreement was unreasonable, having regard to the position of the parties and to the circumstances under which the agreement was made, and that for more than forty years the parties had acted upon the agreement in the sense which the defendants said was its real meaning, continued :— It is true that the parties interested have acted upon the agreement for more than forty years, and their conduct shews that they always understood it until lately as meaning what the defendants contend it does mean. This circumstance renders it necessary for the Court to be careful not lightly to come to the conclusion that the parties have been for many years labouring under a mistake. But the agreement of 1854 cannot be regarded as an ancient document the language of which may not now convey the same meaning as it did when written, and the language of which may therefore be properly construed by the light of contemporaneous and long usage.

Wadley v. *Bayliss* (1) was strongly relied upon by the appellants in support of their contention that the construction for many years put on the document by the parties themselves ought to be adopted by the Court in preference to the meaning which the Court would put upon it, apart from the conduct of the parties themselves. But *Wadley* v. *Bayliss* (1) was the case of an ambiguous inclosure award, and the acts of the occupiers under it were admissible against them. That case must be compared with other decisions, such as *Clifton* v.

(1) 5 Taunt. 752.

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Walmesley (1), which is much more like the present case. On looking into the authorities—amongst them *Clyde Navigation Trustees* v. *Laird* (2)—I have come to the conclusion that the rights of the parties must be decided now as the Court would have decided them as soon as the agreement became binding, and before the parties had shewn by their conduct how they understood it.

The agreement in question is an agreement for a lease for 1000 years of certain way-leaves and other rights over lands of Lord Hastings. But although the agreement is not a lease but an agreement for a lease, all the terms on which the lease is to be granted are fully set out, and nothing is left for future determination except the exact definition or description of the railways and works which the railway company were to make on Lord Hastings' land. Everything else is carefully provided for in detail. It would not, therefore, be correct to treat this as an executory agreement, that is, as a document containing heads or main terms to be supplemented by other clauses and put into shape and possibly corrected in point of language in a more formal and more carefully prepared document. The agreement must be construed as if there were nothing executory about it.

[After stating the facts of the case and going through the clauses of the agreement of 1854, his Lordship continued:—]

The problem to be solved is reduced to this: Is the omission in this agreement to provide machinery for ascertaining the sums payable for coals carried to Blyth over railways not crossing Lord Hastings' land sufficient to control the otherwise clear language which imposes on the company the obligation to pay such sums? This question must, I think, be answered in the negative, that is, adversely to the railway company. But the defective machinery for ascertaining the amount payable is quite sufficient to account for the construction put on the deed by men of business for years. If this were an action to rectify the deed, the Court would have to consider which part had to be rectified, namely, the clause imposing the obligation to pay the 3*s*., or the defective clauses for ascertaining

(1) 5 T. R. 564. (2) 8 App. Cas. 658, 670, 673.

the amount payable. But, as the deed stands, the clear words imposing the obligation must prevail over the doubt raised by the defective covenants for ascertaining the amount to be paid.

The last point which requires notice is that the action is not brought by the proper party, and that it ought to have been brought by the legal personal representatives of Jacob, Lord Hastings, the covenantor in the deed. This is a purely technical point, and, if a good one, would only affect the costs of this action. The answer, however, to this objection is that there is sufficient privity of estate between the owners of the land over which the way-leaves were granted and the defendants to enable such owners to sue the defendants on their covenants, and the 3*s.* per ten is to be paid for the way-leaves and other rights conferred on the railway company. All this has been carefully explained by Byrne J., whose judgment on this point is reported (1), and I cannot usefully add to that judgment, or say more than that I concur in his decision on this part of the case. His judgment is, in my opinion, correct, and the appeal must be dismissed with costs.

RIGBY and VAUGHAN WILLIAMS L.JJ. concurred.

Solicitors: *Williamson, Hill & Co., for A. Kaye Butterworth, York; Horace Peel.*

(1) [1898] 2 Ch. 674.

G. I. F. C.

NORTH J.
1899
March 4.

In re HODGSON.
DARLEY *v.* HODGSON.

[1895 H. 2557.]

Married Woman — General Power of Appointment — Exercise of Power— Liability of Appointed Fund to Debts—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 4.

A married woman had power, in the event of her husband surviving her, to appoint the income of a trust fund to him during his life. She had also, in the same event, a general power to appoint by will the capital of the fund as she should think fit. By her will she appointed out of the capital of the fund several sums, including 1100*l.* to D. "in satisfaction of a debt to that amount due from me to her." And she further appointed that (subject as aforesaid) the trustees should pay the whole of the income of the fund to her husband during his life. The husband survived her. There was in fact no debt due from her to D., but there was a debt of 1100*l.* due from her husband to D., and the evidence satisfied the Court that, in the appointment of the 1100*l.*, she intended to refer to that debt. She had at her death separate property applicable to the payment of her debts, but that property was insufficient for the purpose by more than 1100*l.* Some time after her death the husband paid the debt to D.:—

Held, that the appointment had not failed, but was effective, and that the 1100*l.* must be applied in payment of the debts of the testatrix.

Summons by the defendant, N. H. Hodgson, asking for a declaration that a legacy of 1100*l.* mentioned in the will of the testatrix Juliet Hodgson ought not to be treated as an effective legacy, or included in arriving at the total sum referred to in an inquiry directed by the order on the further consideration of the action dated March 1, 1898.

The testatrix, who was married to the defendant in 1870, had under a settlement, dated July 21, 1870, and executed prior to and in contemplation of her marriage to him, a power to appoint, in the event of her husband surviving her, one moiety of the income of the trust funds comprised in the settlement in favour of her husband during his life, the other moiety of the income being in that event settled upon him. And, in case there should be no children of the marriage, and she should die in the lifetime of her husband, the testatrix had a general power

to appoint by will the capital of the trust funds in such manner as she should think fit.

By her will, dated January 10, 1894, the testatrix, in exercise of the power so given to her by the settlement, appointed and directed that the trustees for the time being thereof should immediately after her decease raise, out of that moiety of the trust funds comprised therein to which her husband was not entitled for his life after her decease, a sum of money sufficient to pay her funeral and testamentary expenses and duties (including the duties on the legacies and annuities in the will after mentioned), and pay the same to her executors for the purposes aforesaid, and should also raise and pay thereout the following legacies—namely (inter alia), to Georgina M. B. Darley 1100*l.*, "in satisfaction of a debt to that amount due from me to her." And in further exercise of the power so given to her by the settlement, and of every other power or authority enabling her in that behalf, the testatrix appointed and directed that the said trustees or trustee (subject as aforesaid) should pay the whole of the income of the said moiety of the trust funds to her husband, if he should survive her, during his life.

The testatrix died on July 9, 1895, leaving her husband her surviving. There were no children of the marriage.

The testatrix was mistaken in saying in her will that she owed a debt of 1100*l.* to Georgina M. B. Darley; but a debt of that amount was in fact due from her husband to Miss Darley. There was evidence which, in the opinion of North J., proved that the testatrix intended to refer to that debt. This debt was, on May 4, 1898, after the death of the testatrix, paid by the husband to Miss Darley.

By the order made on the further consideration of this action, dated March 1, 1898, it was declared that certain funds in court were liable for the debts of the testatrix, and that the amount of her funeral and testamentary expenses and a sum equal to the amount of the legacies appointed by her will, and the amount of the legacy or other duties which would have been payable in respect thereof, and the legacy or other duties which would have been payable in respect of certain moneys

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given by her will, ought to be raised out of that moiety of the funds subject to her marriage settlement in which no life interest was conferred on the husband by the settlement. And it was also declared that, subject to the amount so to be raised as aforesaid, the husband was entitled during his life to the income of the same moiety. And that, subject as aforesaid, and, subject as to the other moiety of the trust funds to the determinable life interest therein conferred upon the husband by the settlement, the trust funds subject to the settlement were liable for the debts of the testatrix. And an inquiry was directed what was the total sum which ought to be raised as aforesaid in respect of the funeral and testamentary expenses, legacies, and duties.

It was admitted that the estate of the testatrix was insolvent, even if the 1100*l.* appointed to Miss Darley was included in it.

Vernon Smith, Q.C., and *Rowden*, for the husband. The creditors can only take through the appointee on the footing that she is a trustee for them: *Williams* v. *Lomas*. (1) The appointment to Miss Darley is ineffectual. The testatrix had no intention of conferring a bounty on the appointee; she intended only to discharge an obligation which she supposed to exist, but which in fact did not exist: *In re Rowe*. (2)

[NORTH J. If the appointment was good, and the appointee became a trustee for the creditors of the testatrix, how could she get rid of the trust by claiming payment of her debt from another person?]

She had no choice in the matter; she must accept payment from her debtor. If the appointment was originally good, the gift is destroyed by the subsequent payment of the debt: *In re Fletcher*. (3) If the appointee could take nothing under the appointment, the creditors can take nothing. If the debt had been paid by the husband in the lifetime of the testatrix, the appointment would clearly have failed: *In re Boyd* (4); *In re Davies' Trusts*. (5) What difference can it make that the debt

(1) (1852) 16 Beav. 1.
(2) [1898] 1 Ch. 153.
(3) (1888) 38 Ch. D. 373.
(4) [1897] 2 Ch. 232.
(5) (1871) L. R. 13 Eq. 163.

was paid after her death, but before the fund had been handed over to the appointee?

In the absence of a plain general intention to make the appointed fund the testatrix's own property for all purposes, the fund does not become assets for the payment of her debts when the appointment fails by reason of the appointee predeceasing the appointor. The mere appointment of an executor is not sufficient evidence of an intention to make property subject to a power of appointment assets of the appointor for all purposes: *In re Thurston.* (1) What is necessary to shew such an intention is illustrated by *Coxen* v. *Rowland.* (2) It is necessary that the power should be validly exercised: *Ex parte Gilchrist* (3), and creditors have no equity to have a defective exercise made good: *Holmes* v. *Coghill.* (4)

H. Terrell, Q.C., and *A. Adams*, for creditors having the conduct of the action. The general power has been validly and effectually exercised in the appointment of the 1100*l.* Though the testatrix was not in fact indebted to the appointee, her husband was indebted to her in that amount, and the evidence shews that the testatrix intended to refer to that debt, and to provide for its payment. This being so, the appointment was an effective one at the time of her death, and the subsequent payment of the debt by the husband cannot affect its validity or the rights of the creditors of the testatrix. Consequently, s. 4 (5) of the Married Women's Property Act, 1882, applies, and renders the appointed fund liable for the debts of the testatrix, just as her separate property would be. Since the Act it is not necessary to shew a general intention of the testatrix to make the fund her own. The appointed fund is, therefore, liable to pay her debts after her separate estate. That estate is insufficient for the purpose, even if the 1100*l.* is included, and, therefore, the whole of the 1100*l.* should be applied in payment

(1) (1886) 32 Ch. D. 508.
(2) [1894] 1 Ch. 406.
(3) (1886) 17 Q. B. D. 521.
(4) (1806) 12 Ves. 206.
(5) By s. 4, "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

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of the debts. It is clear from the order on further consideration that the testatrix had other separate estate.

Vernon Smith, Q.C., in reply.

NORTH J. In my opinion the power was effectually exercised in the appointment of 1100*l.* to Miss Darley. Upon the evidence which was before me in chambers I came to the conclusion that, when the testatrix spoke of the debt of 1100*l.* due from herself to Miss Darley, she intended to refer to the debt which was due from her husband to Miss Darley, and that she made the appointment for the purpose of discharging that debt. At the time of her death that debt had not been paid; it was still a subsisting debt. I need not, therefore, consider what would have been the effect of the payment of the debt in her lifetime. At the time of her death the appointment was clearly good. Some time afterwards her husband paid the debt. It is said on his behalf that this payment put an end to the appointment altogether. In my opinion it did not. It may well be that Miss Darley herself could not afterwards have claimed the appointed fund; but I cannot see how this subsequent payment can affect the validity of the appointment, when it was a good exercise of the power at the time of the death of the testatrix. In my opinion the appointment is still effectual, and it comes within s. 4 of the Married Women's Property Act, 1882, which makes the appointed fund liable for the debts of the testatrix in the same manner as her separate estate is made liable under the Act.

The order on the further consideration of the action shews that the testatrix had other separate property liable for the payment of her debts, and consequently the difficulty which I felt during the argument, by reason of the cases such as *In re Shakespear* (1), which have decided, upon the construction of sub-s. 4 of s. 1 of the Act, that after-acquired separate property of a married woman is not liable for the payment of her debt, unless she had separate property at the time when the debt was contracted, does not arise. The result is that the

(1) (1885) 30 Ch. D. 169.

appointment of the 1100*l.* renders that sum assets for the payment of the debts of the testatrix after her other separate estate has been applied for that purpose. But, inasmuch as it appears that the whole of her separate property, even with the addition of the 1100*l.*, will be insufficient, the whole of that sum must be applied in payment of her debts.

Solicitors: *Patersons, Snow & Co., for Gardiner & Jeffery, Bradford; Bell, Brodrick & Gray.*

W. L. C.

McKEOWN *v.* JOINT STOCK INSTITUTE, LIMITED.

[1895 M. 1008.]

Practice—Attachment—Order against Corporation—Disobedience—Enforcement by Attachment of Director—Service of Order—Rules of Supreme Court, 1883, *Order* XLII., *r.* 31.

Obedience to an order made against a corporation will not be enforced, under rule 31 of Order XLII., by the attachment of a director of the corporation, unless the order has been served personally upon the director.

MOTION by the plaintiff for leave to issue a writ or writs of attachment against the sole director and the secretary of the defendant company.

The company was the only defendant to the action. By the judgment at the trial on May 22, 1896, it was declared that the plaintiff was entitled to have an account of all moneys received by the defendants for or on behalf of the plaintiff and the other subscribers to the defendant institute as in the pleadings mentioned, and of the manner in which and the purposes for which such moneys had been expended or applied; and it was ordered that the defendants should deliver to the plaintiff such account accordingly.

The defendants failed to comply with this order, and various applications were made to enforce compliance. Ultimately, on October 31, 1898, an order was made that the defendants, by F. E. Julian, their secretary, should, within seven days after service of the order, make and file a full and sufficient affidavit

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giving the dates upon which and the prices at which the various shares mentioned in an account (exhibited to an affidavit of the plaintiff filed on January 12, 1898) delivered by the defendants were purchased. This order was personally served on Julian as secretary to the defendants; but it was not served upon Mr. Horatio Bottomley, who was the sole director of the company.

On December, 28, 1898, the plaintiff gave notice of motion, asking that he might be at liberty to issue a writ or writs of attachment against Bottomley, the director, and F. E. Julian, the secretary, of the defendant company, for their contempt in wilfully disobeying the order of October 31, 1898, in that the defendant company had not by Julian, their secretary, filed a full and sufficient affidavit as directed by that order.

This notice of motion was served upon Bottomley and upon Julian.

Martelli, for the plaintiff. Rule 31 (1) of Order XLII. of the Rules of the Supreme Court authorizes this application, and the evidence shews that the order of October 31 has been wilfully disobeyed. Bottomley, being the sole director of the company, must be the person responsible for the disobedience.

Hon. E. C. Macnaghten, *Q.C.*, and *Job Bradford*, for the company.

Rufus Isaacs, *Q.C.*, and *Ashton Cross*, for Bottomley. The order of October 31 ought to have been personally served on Bottomley, and there is no evidence that this has been done. He denies that he has been served. Before a man can be attached for not doing an act he ought to be served with the order which requires that the act should be done. Otherwise, it cannot be said that he has wilfully disobeyed the order. In proceedings for attachment every detail of the rules must be followed strictly: *Stockton Football Co.* v. *Gaston*. (2)

Martelli, in reply. The rules do not require that the order

(1) Rule 31: "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

(2) [1895] 1 Q. B. 453.

should be served on Bottomley. The order was made upon the company, not upon him. Rule 31 provides a special mode of enforcing obedience to an order against a corporation. It is presumed that the officers of a corporation know what the corporation has been ordered to do, and whether it has complied with the order or not. Personal service has been dispensed with when the Court has been satisfied that an order has come to the knowledge of the person whom it is sought to attach, and that he is keeping out of the way to avoid service: *Allen* v. *Allen* (1); *Hyde* v. *Hyde*. (2) Moreover, Bottomley must be taken to have waived personal service: *Ex parte Alcock*. (3)

North J. It was admitted when the case was last before me that the affidavit which had then been made by the secretary was nothing like a compliance with the order which had been previously made. In my opinion the present affidavit is as illusory as any of the affidavits previously made. Such an affidavit is mere trifling with the Court. I am now asked to send Mr. Bottomley to prison for wilful disobedience to the order of October 31, and it is objected on his behalf that he has never been personally served with that order. I think the plaintiff has made a mistake. In my opinion I ought not to order an attachment to issue against Bottomley as a director and send him to prison until he has been personally served with the order which has been disobeyed. The motion must stand over to enable the plaintiff to serve Bottomley personally, and I give leave to amend. The parties have for a long time successfully evaded giving the required information. My patience is at last exhausted; and, when the proper service has been effected, I shall deal with the matter finally, if the required information has not then been given.

Solicitors: *Woodcock, Ryland & Parker, for Lingard & Gaunt, Manchester; William Webb & Co.*

(1) (1885) 10 P. D. 187. (2) (1888) 13 P. D. 166.
(3) (1875) 1 C. P. D. 68.

W. L. C.

STIRLING J.

1898

Dec. 14.

1899

Feb. 15.

In re BARCLAY.

BARCLAY *v.* ANDREW.

[1892 B. 3761.]

Trustee and Cestui que Trust—Breach of Trust—Accumulation Clause—Wilful Default—Compound Interest—Rate of Interest.

A testator bequeathed the proceeds of his residuary estate upon trust for his children, and directed the trustees to apply towards the maintenance of the infant children the whole or part of the income of their expectant shares, and to accumulate the residue of the income and the income thereof at compound interest. In an administration action brought by the beneficiaries against the trustees two special inquiries were directed by the judgment—(1.) whether the residuary estate and the accumulated income were properly invested; (2.) what sums had been expended in maintenance; and, as the result of those inquiries, certain balances were found due from the trustees:—

Held, (1.) that in a proper case it was competent for the Court, upon the further consideration of an action, to charge trustees with interest, whether simple or compound, on balances retained in their hands, although no case of wilful default had been raised by the pleadings, and the question of interest was not referred to in the judgment; (2.) that as the trustees had neglected to comply with the express trust for accumulation they were chargeable with compound interest upon the balances in their hands, but at the rate of 3 per cent. only, and that in ascertaining such balances trust funds improperly invested were to be treated as remaining in their hands.

Knott v. *Cottee*, (1852) 16 Beav. 77, followed, except as to the rate of interest.

This was the further consideration of an action for the administration of the trusts of the will of the Right Rev. Joseph Barclay, the late Bishop of Jerusalem.

It was sought by the statement of claim in the action to make the defendants liable for breaches of trust. Of the plaintiffs two were when the action was brought infants, and one of them was still an infant. The defendants were the surviving trustees of the will and the executors of a deceased trustee.

The testator by his will directed his estate to be realized and invested in the usual way, and to be held upon trust to pay the income to his wife during widowhood, and then upon trust for all his children other than an eldest or only son, who might for

the time being be entitled to the life interest in testator's Irish property; and the testator declared that the trustees or trustee for the time being of his will should, after the decease or second marriage of his said wife, if any child or grandchild of him (the testator) entitled in expectancy to any share or interest under that his will should be an infant, apply the whole, or such part as they or he should think fit, of the income of the expectant share of such infant for or towards his or her maintenance and education, and should invest the residue (if any) of the said income and the resulting income thereof in the names or name of the said trustees or trustee for the time being in or upon any such stocks, funds, or securities as aforesaid, so as to accumulate at compound interest with power to vary the investments.

The testator died in 1881, leaving a widow and seven children surviving him. The testator's widow died on March 5, 1882. The statement of claim alleged that shortly after the testator's death Colonel Edmund Smyth voluntarily undertook the maintenance and education of the infant plaintiffs during their respective minorities, and, with a view of increasing their respective shares in the testator's estate, informed the trustees that he would not require any part of the income of such respective shares to be paid to him, but that the whole of such income might be reinvested by way of accumulation (paragraph 7); that in October, 1891, certain extracts from accounts were furnished to the solicitors of the adult plaintiff through the solicitors of the defendant Alfred Andrew Andrew, from which it appeared that the net residuary trust estate amounted to 8169*l.* 19*s.* 3*d.*, and that a further sum of 600*l.*, which had been previously referred to in the statement of claim, amounted with the accumulated income thereon to the sum of 724*l.* 19*s.* 5*d.* on December 15, 1887, but that no particulars were furnished of the mode in which either of the foregoing accounts had been or were then invested (paragraph 11); that in December, 1891, certain securities were produced by the solicitors of the defendant Alfred Andrew Andrew as representing the investments of the amounts referred to in the last preceding paragraph; that upon examination of such securities it appeared that they represented an amount considerably less than the sums to be

STIRLING J. accounted for; that they included advances made upon mortgage without any prior valuations or reports, and that no less than 3500*l.* of the trust estate had been advanced upon the security of property of which the defendant Alfred Andrew Andrew was the owner (paragraph 12); that at subsequent interviews, which took place in March and April, 1892, the defendant Alfred Andrew Andrew admitted that the trustees had accumulated the income of the infant plaintiffs' expectant shares, and stated that there were some securities for such accumulations, but gave no particulars for such securities; that he further admitted that he had mixed the trust moneys with moneys of his own, and alleged that certain documents which he produced, and which purported to be charges upon certain reversionary interests to secure sums of money amounting to 500*l.*, 200*l.* and 400*l.*, with interest at the respective rates of 10 per cent. and 12 per cent., were securities given in exchange for advances made partly out of his own moneys and partly out of the trust estate (paragraph 13). The plaintiffs claimed (by clause 2) "that the defendant Alfred Andrew Andrew and John Sydney Key Moss and the estate of the Rev. William Wayte Andrew deceased may be declared jointly and severally liable to make good all loss which may have accrued to the trust estate by reason of any breaches of trust committed during the lifetime of the said William Wayte Andrew and that the defendants Alfred Andrew Andrew and John Sydney Key Moss may in like manner be declared jointly and severally liable to make good all loss which may have accrued to the trust estate by reason of any breaches of trust committed since the date of the death of the said William Wayte Andrew."

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The defendant Andrew by his defence admitted that Colonel Smyth, shortly after the testator's death, voluntarily undertook the maintenance and education of the infant plaintiffs, and informed the trustees that he would not require any part of the income of their respective shares to be paid to him. But he alleged that the said Colonel Edmund Smyth did not inform the trustees that such interest might be accumulated, but, on the contrary, told the trustees to apply such income for the maintenance and education and support of the other children

of the testator; and that the trustees, in accordance with such directions and acting in good faith and in reliance thereon, applied such income accordingly as the income arising from the share of each child had not been sufficient for the maintenance, education, and support of such child. By paragraph 9 of his defence he refused to admit the allegations contained in paragraph 12 of the statement of claim, and he denied that the securities representing the investments of the testator's estate represented an amount considerably or at all less than the sums to be accounted for, or that any advances had been made upon mortgage without any prior valuation or report, or upon any insufficient security, or that 3500*l.* had been advanced upon the security of property of which he was the owner at the time when the advances were made; but he admitted that he had purchased the equity of redemption of certain property whereon the trustees had previously made an advance. In paragraph 10 he stated that the trustees had not accumulated the income of the infant plaintiffs' shares, nor did they hold any securities for such accumulations; and that he was never asked for particulars of the securities for such accumulations; and, further, that he had not mixed the trust moneys with moneys of his own.

The defendant Moss also put in a defence in which he said: "When the above-named Edmund Smyth undertook the maintenance and education of the infant plaintiffs during their respective minorities he stated that he would not require any part of the income of the infant plaintiffs' shares in the testator's estate to be paid to him and so that such income might be taken for the maintenance and education of the other children of the testator. Some time subsequently the said Edmund Smyth intimated that the income of the infant plaintiffs' shares should be accumulated for the benefit of the infant plaintiffs." The remaining two defendants, Messrs. Callis and Fraser, stated in paragraph 6 of their defence that they did not admit that their co-defendant Alfred Andrew Andrew had made any such statements or committed any such breaches of trust as were referred to in paragraph 13 of the statement of claim.

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The case came on to be tried in November, 1893, when judgment was given by consent. It was thereby ordered (inter alia), upon the defendant Alfred Andrew Andrew by his counsel undertaking without prejudice to any question of indemnity or contribution between the defendants or any of them, or the defendants Alfred Andrew Andrew and John Sydney Key Moss and the estate of the Rev. William Wayte Andrew, to make good to the estate of the above-named testator the Right Rev. Joseph Barclay, deceased, all loss which had already accrued or might thereafter accrue by reason of any alleged breaches of trust committed by the defendants Alfred Andrew Andrew and John Sydney Key Moss and the Rev. William Wayte Andrew, deceased, or any of them, that it be referred to the taxing master to tax the costs of the plaintiffs of the action incurred up to the date of the judgment; and that the said costs when taxed should be paid by the defendants without prejudice to the question how and by which of the said defendants such costs should ultimately be borne. And the defendants, the Rev. John Callis and James Edward Fraser, by their counsel admitting assets of the Rev. William Wayte Andrew, deceased, sufficient for the purpose of this action, it was ordered that the following account and inquiries be taken:—

1. "An account of the personal estate not specifically bequeathed of the testator the Right Rev. Joseph Barclay and of the income thereof come to the hands of the defendants A. A. Andrew and J. S. K. Moss and of the Rev. William Wayte Andrew deceased the executors of his will or any of them or of any other person or persons by the order or for the use of the said defendants and of the Rev. William Wayte Andrew deceased or any of them."

2. "An inquiry of what particulars the residuary personal estate of the above-named testator consisted at the time of his death and now consists and upon what securities the same and the sum of 600*l.* in the pleadings mentioned and the accumulated income thereof respectively are now invested and whether such investments are proper for the investment of the funds subject to the trusts of the will."

3. "An inquiry what sums have been expended by the

defendants Alfred Andrew Andrew and John Sydney Key Moss and the said Rev. William Wayte Andrew deceased or any of them for the maintenance and education of the testator's children."

By his certificate made in pursuance of that judgment the master found that there was a balance due from defendants on capital account of 2553*l.* 15*s.* 4*d.*, and that there was a balance due from them on the income account of 1277*l.* 12*s.* 3*d.*, and he stated particularly that "the item of disbursement No. 16 was stated to be an advance on mortgage of certain property to Langham and others; but inasmuch as such an advance was not an investment authorized by the testator's will he had disallowed the same." Then he found the amount expended on maintenance.

The plaintiffs now applied on the further consideration that the defendants might be charged compound interest on balances in their hands.

Jenkins, Q.C., and *Martelli*, for the plaintiffs. The defendants having neglected to comply with the express trust for accumulation are chargeable with compound interest on the balances in their hands: *In re Emmet's Estate.* (1)

Elgood, for other children of the testator.

Upjohn, Q.C., and *Younger*, for the defendant Andrew. The defendants cannot be charged with interest as for wilful default on anything arising on the taking of the accounts. In order that trustees should be made liable on the footing of wilful default the charge must be raised by the pleadings, and must be dealt with by the judgment.

[They cited *Job* v. *Job* (2); *Barber* v. *Mackrell* (3); *Jones* v. *Morrall* (4); *Mayer* v. *Murray* (5); *Hollingsworth* v. *Shakeshaft* (6); *In re Symons* (7); *Smith* v. *Armitage* (8); *In re Stevens* (9); *Hewett* v. *Foster.* (10)

(1) (1881) 17 Ch. D. 142.
(2) (1877) 6 Ch. D. 562.
(3) (1879) 12 Ch. D. 534.
(4) (1852) 2 Sim. (N.S.) 241.
(5) (1878) 8 Ch. D. 424.
(6) (1851) 14 Beav. 492.
(7) (1882) 21 Ch. D. 757.
(8) (1883) 24 Ch. D. 727.
(9) [1898] 1 Ch. 162.
(10) (1843) 6 Beav. 259.

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MacSwinney, for the defendant Moss, cited *Nelson* v. *Booth* (1), and Williams on Executors, 9th ed. p. 1756.

Badcock, for the executors of the Rev. W. W. Andrew, cited *Gilroy* v. *Stephen*. (2)

Jenkins, *Q.C.*, in reply. I put my case upon the express trust for accumulation, not upon misconduct.

[STIRLING J. referred to *Attorney-General* v. *Alford*. (3)]

Cur. adv. vult.

Feb. 15. STIRLING J. (after stating the facts as above):—Assuming that the certificate is a proper one (as to which I shall have a word to say at a later stage), there would seem to be a primâ facie ground for charging the defendants with interest, but compound interest is objected to on various grounds. It was said in the first place that the judgment being by consent was a compromise, and that on that ground the plaintiffs were precluded from claiming compound interest on the balances in the hands of the executors. Now, a compromise as it is generally understood involves some sort of bargain—a giving up of some right for some valuable consideration. It seems to me that there is a great difficulty in coming to the conclusion upon this judgment that anything was given up. In the first place, we find the trustees submitting to a judgment against them with costs, and I need not say that the last thing which a trustee abandons is his right to costs out of the estate. Furthermore, two of the plaintiffs at the time when the judgment was taken were infants, and it is the usual, I may say almost the invariable practice, when a compromise is proposed to be effected on behalf of the infants, to obtain the sanction of the Court to that compromise. There is no trace of such a sanction having been obtained. It seems to me that one might very well arrive at the conclusion that the only effect of the consent was to relieve the plaintiffs from the necessity of adducing evidence to justify the Court in giving a judgment such as was actually given. Whether this be so or

(1) (1858) 3 De G. & J. 119. (2) (1882) 30 W. R. 745.
(3) (1855) 4 D. M. & G. 843.

no the judgment is one for accounts and inquiries only, and I think that upon that judgment the plaintiffs are entitled on further consideration to such further relief as is consistent with the ordinary practice of the Court, and that such relief cannot be held to be abandoned. Now, the judgment contains first of all a direction for the usual account of the personal estate coming to the hands of the trustees of the will. In addition to that, there are two special matters as to both of which issues were raised by the pleadings, namely, in the first place, whether the existing investments of corpus and accumulated income were proper, and, secondly, whether the income had been, as was alleged by the defendant Andrew, wholly applied for the purposes of maintenance. The latter of those issues was one which the Court would not have decided at the trial, involving as it does the taking of an account; and I apprehend that it is not the usual practice of the Court to decide at the trial the consequences which would result if the allegations of the defendant Andrew should prove not to be in accordance with the fact.

Then it is contended—and this really is the main contention—that to make the defendants liable for compound interest would be really to charge them with wilful default, and that this cannot be done at the present stage of the action, no case of wilful default being made by the pleadings or proved at the trial. Undoubtedly, prior to the practice introduced by the Judicature Acts the rule as to wilful default was very strict, but, as the authorities now stand, it has been relaxed to some extent, as is shewn by the two latest cases which I can find on the subject, namely, *In re Symons* (1) and *Smith* v. *Armitage*. (2)

Still, even while the rule prevailed in the strictest form, a distinction was drawn between a charge of wilful default properly so called and a claim for interest on balances retained in his hands by a trustee or executor.

This subject is discussed with great care by Kindersley V.-C. in the case of *Jones* v. *Morrall* (3), where he had occasion to

(1) 21 Ch. D. 757. (2) 24 Ch. D. 727.
(3) 2 Sim. (N.S.) 241.

STIRLING J. draw the distinction. He says (1): "There is no direction for any inquiry on which to charge them with what, without wilful default, they might have received. If it had been intended to raise that point, the Court ought at the hearing to have been induced to make some declaration, or to direct some inquiry, on the result of which on further directions it might act. The rule on this subject I conceive is this: If the pleadings do not raise the point, it cannot be raised either at the original hearing nor on further directions, but if the plaintiff's pleadings do, as in this case, raise the point whether the defendants are liable for wilful default, it is the duty of the plaintiff if he can make a case for it, to get a declaration by the decree, or if he cannot make a sufficient case for an immediate decree, to get an inquiry of such a character, that on the result of it, the Court may on further directions make a declaration. But if the point is raised on the pleadings, and the Court by its decree passes it by, and neither makes any declaration, nor directs an inquiry, it must be taken that the Court did not mean to give any such relief; either that it was passed by by the plaintiff, or that being urged by the plaintiff, the Court did not think fit to give it." Therefore, so far as the wilful default was concerned in that case, the Vice-Chancellor refused to give any relief in respect of it. Then (2) he refers to the contention of the plaintiff that the defendants ought to be held liable for interest on the balances from time to time in their hands. And upon that question he says: "The defendants, sought to be charged, insist that applying the rule to which I have referred, the plaintiff cannot now claim interest on balances, because there was no declaration or inquiry as to balances at the hearing. But it appears to me that, correctly applying the rule, the plaintiff has a right to raise the question." That I apprehend to be the rule of the Court.

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It was said, however, that this rule only applied where simple interest was claimed, and it becomes necessary to consider the principle on which the Court charges trustees and executors with interest, whether simple or compound, on the funds in their hands. Now, undoubtedly it is the general

(1) 2 Sim. (N.S.) 249–50. (2) 2 Sim. (N.S.) 251.

rule that only simple interest is so charged; but there are several well-established exceptions, one of those being where there is an express trust for accumulation, a recent example of which is afforded by the case of *In re Emmet's Estate.* (1) That, however, was a case in which compound interest was charged at the hearing; but it is necessary from any point of view to consider the principle on which the Court charges interest. That is laid down by Lord Cranworth in the well-known case of the *Attorney-General* v. *Alford.* (2) He says this: "I will state shortly why I do not quite understand the principle upon which the Court has proceeded in the cases to which I have referred, though I do not know that I shall not be able, nevertheless, satisfactorily to come to the conclusion at which I have arrived in the present case. In many of the cases it is stated, that the Court proceeds in pœnam to punish the executor, but what is the meaning of this? Why not punish him by making him account for more principal than he has received, if he is to be punished by having to account for more interest than he has received? What the Court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it." That is the principle.

The question then arises, does that apply where compound interest is sought to be charged? Now, upon that I have the guidance of the decision of Fry J. in the case of *Gilroy* v. *Stephen.* (3) That again is a case of a motion for judgment; but the learned judge discusses the principle on which compound interest is to be charged. He refers, as I have done, to the case of the *Attorney-General* v. *Alford* (2), and cites the passage to which I have just referred, and then proceeds thus: "In the present case no interest was actually received, and the defendant cannot fairly be presumed to have received any; therefore the first and third alternatives given by Lord Cranworth do not apply. But it appears to me that the inquiry I

(1) 17 Ch. D. 142.
(2) 4 D. M. & G. 843, 851.
(3) 30 W. R. 745.

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have to make is the second one intimated by Lord Cranworth, What may I justly say the defendant ought to have received? What was the reasonable and proper thing for her to have done? It was to direct the payment of the dividends to some banker, and to instruct him to invest the dividends in Consols, as received, and also the income of such investments as it came in. In that way the funds would have been invested at 3 per cent. at compound interest. There was no reason for not doing this, as there was no maintenance to be paid, nor any other payments to be made. The estate had long been realized, and there was nothing to do but to keep the fund in hand until the plaintiff was entitled to payment of it," and on that principle he directed compound interest to be charged. This I need hardly say agrees with the principle laid down by Lord Eldon in the old case of *Raphael* v. *Boehm* (1), where he shortly states it thus: "Where there is an express trust to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms, upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal; and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest."

Pausing there for a moment we get this—that the practice of the Court is to allow interest to be charged on balances in the hands of a trustee or executor on further consideration, and that the principle on which the rate of interest is to be charged is determined by the rule laid down by Lord Cranworth, and that the charging compound interest falls within that rule. I fail, therefore, to see on principle why in a proper case upon further consideration compound interest should not be charged, even although it be not mentioned and nothing be said about it in the original judgment. But in point of fact the case seems to me to be covered by authority, namely, the case of *Knott* v. *Cottee* (2), which in some of its features is singularly like the present. The testator bequeathed his

(1) (1805) 11 Ves. 92, 107. (2) 16 Beav. 77.

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personal estate to Cottee and two others, upon trust to invest the produce in the public or Government stocks or funds of Great Britain, or upon real security in England or Wales, and to hold upon certain trusts during the life of his widow and afterwards upon trusts in favour of his infant children and their families, and he directed that after the death of his wife the trustees should apply the income towards the maintenance and education of his children during their minority, and accumulate the surplus. The executor invested part of the testator's personal estate in Russian, Belgian, Dutch, and other foreign bonds, which were not proper trust investments. By the decree made in March, 1848, the Court declared that the investment of the personal estate in Exchequer bills, Russian bonds, Belgian, Dutch, and other foreign stock, was an improper investment, and that in taking the accounts the master was to have regard to that declaration. The case came before the Court upon exceptions and for further directions, and it was contended for the plaintiffs that, the executor having neglected to obey the express directions for accumulation, he was chargeable with interest on the balance in his hands of 5 per cent. with annual rests. It was contended, on the other hand, that the direction to accumulate applied only to the surplus income, and that the executor was chargeable with 4 per cent. only on balances in hand, but not with annual rests. I have examined the decree in the registrar's book, and find that the report is perfectly accurate in stating that there was no direction contained in the original decree with reference to charging compound interest. The Master of the Rolls says this (1): "Here is an executor who had a direct and positive trust to perform, which was, to invest the money upon Government stocks or funds, or upon real securities, and accumulate at compound interest all the balances, after maintaining the children. He has made certain investments, which the Court has declared to be improper. The case must either be treated as if these investments had not been made, or had been made for his own benefit out of his own moneys, and that he had at the same time retained moneys of the testator in his hands. I think,

(1) 16 Beav. 79.

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therefore, that there must be a reference back, to ascertain what balances the executor retained from time to time, it being clear that he has retained some balances. The next question is, at what rate of interest ought he to be charged? The usual course is, to charge an executor with 4 per cent., where he has simply retained balances, but where he has acted improperly, or has employed the trust money in trade for his own benefit, or has been guilty of other acts of misconduct, the Court visits him with interest at 5 per cent. In this case there does not appear to me to have been any such misconduct as to make him answerable at 5 per cent. It appears simply a case in which an executor has retained moneys, which he has not properly invested. I am therefore of opinion that he ought to be charged with interest at 4 per cent. and with annual rests, for there is an express trust for accumulation, of which he was aware when he retained the trust moneys." That seems to me to be precisely in point and to afford a precedent which I ought to follow, with this exception, that I think the rate of interest should, in accordance with what I now understand to be the practice that has been adopted at any rate by all judges of first instance in this Division in similar cases, be 3 per cent. instead of 4.

Now I come to refer to the certificate. It appears that the balance of capital which is found due from the trustees is largely attributable to one investment, that item No. 16 to which I have referred, and notwithstanding that that investment is disallowed the executor has been charged with interest upon it at 4 per cent. and that constitutes a large portion of the balance of 1277*l.* 12*s.* 3*d.* which is found due by the certificate from him. I have made inquiries as to what took place in chambers with reference to that, and I strongly suspect there has been a slip. The account, I find, was never taken before the master, but was really taken by consent before a junior clerk. Now, there has been no summons to vary and I do not think that it is necessary that the certificate should be varied in that respect. I propose to apply the principle laid down by the Master of the Rolls, namely, that the improper investment, as it is found to be, must be treated

either as if it had not been made, or had been made for the benefit of the trustee out of his own moneys, and on that footing the charge of compound interest is to be made. If the plaintiffs claim compound interest at 3 per cent., then the payments in respect of interest which are entered in the account ought not to be treated as binding on the defendants, and the benefit of them ought not to be claimed by the plaintiffs. I think, therefore, that the proper course is to follow the inquiry directed in *Knott* v. *Cottee* (1), and to direct an inquiry what balances remained in the hands of the defendants at the end of one year from the testator's death and each subsequent year, and that in ascertaining such balances the item of disbursement No. 16 in the master's certificate mentioned is to be treated as remaining in the hands of the defendant Alfred Andrew Andrew. Then the account will be taken with annual rests and interest will be computed at 3 per cent.

Solicitors: *Gush, Phillips, Walters & Williams; Sandom, Kersey & Knight; Minet, Harvie & May; S. W. Johnson & Son.*

(1) 16 Beav. 77.

H. B. H.

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In re EGAN.
MILLS *v.* PENTON.

[1898 E. 890.]

Will—Construction—"Any Money . . . . that may be in my Possession"—Reversionary Interest in Personalty.

Testatrix, who died in 1892, by her will, dated in 1891, after making certain bequests of sums of stock, declared as follows: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death after the payment of my debts funeral and testamentary expenses I give absolutely" to P. She then made certain specific gifts of chattels. At her death she was entitled to a reversionary interest in personalty which fell into possession in 1897:—

Held, that the reversionary interest passed under the bequest to P.

THE testatrix, Ellen Madelina Egan, who died on February 27, 1892, by her will, dated March 3, 1891, declared as follows: "I desire all my debts funeral and testamentary expenses to be paid out of money invested by me for that purpose in the Post Office Savings Bank by Charles Thomas Wren Penton (Colonel) and Mary Maria Elizabeth Mills spinster whom I appoint as my executor and executrix I bequeath to my brother Henry John White Egan the interest of the following sums for his natural life 500*l.* now in East India Stock 300*l.* now in Bombay and Baroda Railway and 300*l.* now in Consols and at his death or if he cannot be found within a year of my death I give and bequeath absolutely to Charles Thomas Wren Penton (Colonel) the 300*l.* now in Bombay and Baroda Railway I give and bequeath absolutely to Herbert Edward Penton and to Arthur Pole Penton the 600*l.* now in East India Stock to be divided equally between them I give and bequeath to Lionel Begbie Ratcliff 200*l.* now in Consols Any money not mentioned in the aforesaid bequests that may be in my possession at my death after the payment of my debts funeral and testamentary expenses I give absolutely to Chas. Thomas Wren Penton (Colonel)." Then she proceeded to make specific gifts of certain chattels, such, for example, as her books, plate, furniture, &c.

At her death the testatrix was entitled to certain reversionary interests in personal estate which did not fall into possession until the year 1897.

This was an originating summons taken out by the plaintiff, Mary Maria Elizabeth Mills, raising the question (inter alia) whether the reversionary interests above referred to passed to the defendant Penton under the bequest aforesaid.

A. W. Watson, for the plaintiff.

Jenkins, Q.C., and *Younger*, for Colonel Penton. The testatrix has clearly shewn an intention to dispose of everything she had. In this will "money" may fairly be construed as meaning "personal estate," and "in possession" as "under control." The testatrix, by the words she has used, meant "personal estate of which I may be possessed at my death." The Court will, in this case, give effect to the presumption against intestacy: *Rogers* v. *Thomas* (1); *Dowson* v. *Gaskoin* (2); *Waite* v. *Combes*. (3)

Butcher, Q.C., and *Austen-Cartmell*, for the next of kin of the testatrix. We submit that there is an intestacy. No doubt the meaning of "money" cannot be restricted to "cash": *In re Cadogan* (4); but according to the authorities the word must be strictly construed, and its meaning cannot be extended so as to include a reversionary interest such as this. There is no context to shew that the testatrix employed the word "money" otherwise than in its correct and proper sense: *Byrom* v. *Brandreth* (5); *Lowe* v. *Thomas*. (6)

Jenkins, Q.C., in reply, referred to *In re Pringle*. (7)

Cur. adv. vult.

Feb. 22. STIRLING J. (after stating the facts). The only clause by which the testatrix disposed of her residuary personal estate is this: "Any money not included in the aforesaid bequests that may be in my possession at my death I

(1) (1837) 2 Keen, 8.
(2) Ibid. 14.
(3) (1852) 5 De G. & Sm. 676.
(4) (1883) 25 Ch. D. 154.
(5) (1873) L. R. 16 Eq. 475.
(6) (1854) 5 D. M. & G. 315.
(7) (1881) 17 Ch. D. 819.

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give absolutely to C. T. W. Penton." Unless that includes the whole residuary personal estate, she has died intestate in regard to it. The words which she uses in that clause are "money not included in the aforesaid bequests"; and it is obvious from the nature of the previous bequests that the testatrix does not there use the word "money" in the strict literal signification of the word as denoting cash. There are many cases in which it has been held that the word "money," especially when it is given, as here, in the form of money remaining after payment of debts and funeral and testamentary expenses, means the general estate or the residuary personal estate of the testator. For example, a leading case on the point is *Rogers* v. *Thomas* (1), where the testatrix, after giving legacies, gave and bequeathed to certain persons "all which may remain of my money after my lawful debts and legacies are paid"; and it was held that those persons were entitled to the residue of the testatrix's residuary personal estate. A similar decision is found in the case which immediately follows it, namely, *Dowson* v. *Gaskoin* (2), which is a decision of the same judge. There are two somewhat remarkable cases to which I desire in addition to refer, namely, *Barrett* v. *White* (3), before Kindersley V.-C., where the testatrix, after directing her debts and funeral expenses to be paid and giving certain legacies and annuities, gave to her two great-nieces "whatever money remains." Then she proceeded, as the testatrix does in the present case, to make specific bequests, and she adds, "If I have omitted naming anything, I leave it to my two sisters"; and there Kindersley V.-C. held that by "money" was meant the residuary personal estate or general personal estate of the testatrix, and that the ultimate gift, "If I have omitted anything . . . ." was not intended or contemplated by the testatrix as a residuary clause. Again, in *Stocks* v. *Barré* (4), the testator after making various bequests bequeathed any money that might remain after payment of his debts to his nurse Fanny Barré; and it was held that the bequest passed the reversionary interest of the testator in a sum which was charged on real

(1) 2 Keen, 8.
(2) Ibid. 14.
(3) (1855) 1 Jur. (N.S.) 652.
(4) (1859) Joh. 54.

estate. This will differs from any to which my attention has been directed in this respect, that it contains the words "any money . . . . that may be in my possession at my death." The words "that may be in my possession" do not occur in any case previously adjudicated upon, and it is contended that, having regard to these words, I ought not to hold that the reversionary interests which are the subject-matter of the application passed under this gift of "money." Now, no doubt lawyers know the difference between an interest which is in possession and one which is in reversion; but the ordinary layman does not use the word "possession" with reference to that distinction. The first meaning which is found for the word "possession" in Johnson's Dictionary is this: "The state of owning or having in one's hands or power property," and that, with, in some cases, slight modifications has been repeated in every other dictionary which I have been able to consult. I think that the fine distinction between such words as "possession," "property," and "ownership" is not one which would be present to the mind of a layman, and I do not think that the words "in my possession" were used by the testatrix with reference to the distinction which lawyers draw between interests in possession and in reversion. I think the true view is that by this gift the testatrix intended to dispose of her whole personal estate which is not specifically given. Consequently, the defendant Colonel Penton is entitled thereto.

Solicitors: *Lee & Pembertons; Pritchard, Englefield & Co., for Simpson, North, Harley & Birkett, Liverpool.*

G. A. S.

STIRLING J.

1899

Feb. 17, 22; *March* 1.

SEN SEN COMPANY *v.* BRITTEN.

[1899 S. 404.]

Trade-mark—Unregistered Trade-mark—Common Law Right—Passing off—Imitation of Get-up—Misrepresentation from Use of the Words "Trade Mark"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 105.

The use by a trader on his goods of the words "trade mark" in connection with a particular mark which he has used as a trade-mark, but for which he has not obtained registration, does not necessarily imply that the trade-mark is registered so as to constitute an offence under s. 105 of the Patents, Designs, and Trade Marks Act, 1883, and apart from s. 105 is not of itself such a misrepresentation as to disentitle him to relief in an action to restrain the imitation of the get-up of his goods.

THIS was a motion to restrain the defendant until judgment in the action from passing off certain goods of his manufacture as the goods of the plaintiffs by means of the get-up of the goods. The goods in question were cachous for the voice. The plaintiffs, an American company, since the year 1896 had sent large quantities of these goods to England and had sold them here. The plaintiffs' goods were made up in small packages got up in a peculiar and distinctive manner. At the top and at the bottom of the front portion of these packages were the words "Sen Sen," with the words "Trade Mark" immediately underneath. With reference to the plaintiffs' right to those words as a trade-mark, it appeared from the evidence filed on their behalf that the trade-mark "Sen Sen" was adopted in America from the first manufacture of the cachous there; that this trade-mark was registered in America, and that an application for registration of the mark in the United Kingdom was proceeding, but that registration had not yet been obtained. It further appeared that the packages used by the plaintiffs in the United Kingdom were precisely similar to those used in America, except that the latter were marked "5 c."

In the course of the arguments the question was raised on

behalf of the defendant whether the use of the words "trade mark" by the plaintiffs in connection with their name was not such a misrepresentation as to disentitle them to the relief which they claimed. This case is reported upon that point only.

Gatey, for the defendant. The plaintiffs, by placing on their packages the words "Trade Mark" immediately underneath the name "Sen Sen," are representing to the public that that is their registered trade-mark, whereas they have no registered trade-mark. That is a misrepresentation which will disentitle them to relief in a court of equity.

Upjohn, Q.C., and *Sebastian*, for the plaintiffs. The statement that "Sen Sen" is the plaintiffs' trade-mark is a perfectly true representation; there is no statement that the trade-mark is registered. The plaintiffs have used their name as a trade-mark in this country since 1896. The Patents, Designs, and Trade Marks Act, 1883, does not take away the common law right to a trade-mark which is acquired by user, but makes registration a condition precedent to suing. Sect. 62 assumes the existence of a proprietary right in a trade-mark independently of the Act. Sect. 64 says "for the purposes of this Act" a trade-mark must consist of certain essential particulars, thus distinguishing between the statutory trade-mark and the old common law trade-mark. Sects. 75 to 77 shew the effect of registration. Sects. 87 and 92 shew that when the Legislature intends to refer to the statutory trade-mark it uses the words "registered" trade-mark, "registered" proprietor. Sect. 105 makes it an offence to use the word "patent" in respect of an unpatented article, and to use the word "registered" as applied to a trade-mark when registration has not been obtained; but it does not make it an offence to use the words "trade mark" where there has been no registration. That a trade-mark may still be acquired by user is shewn by *Mouson & Co.* v. *Boehm* (1), *In re Hudson's Trade Marks* (2), and *Barlow & Jones* v. *Johnson & Co.* (3)

(1) (1884) 26 Ch. D. 398. (2) (1886) 32 Ch. D. 311.
(3) (1890) 7 Rep. Pat. Cas. 395.

STIRLING J. 1899 SEN SEN COMPANY v. BRITTEN.

Assuming that there is a misrepresentation, it is a collateral misrepresentation only, since the plaintiffs are suing in respect of the whole get-up of the goods, and is not such as to operate as a bar to relief: *M. Melachrino & Co.* v. *R. Melachrino & Co.* (1); *Ford* v. *Foster*. (2)

Gatey, in reply. This case falls under the general principle that a plaintiff who is guilty of making a false representation in respect of his trade-mark cannot obtain relief in a court of equity. This principle is illustrated by *Morgan* v. *M'Adam* (3); *Cheavin* v. *Walker* (4), which were cases of the improper use of the word "patent." *Lewis's* v. *Goodbody* (5) is precisely in point. Where a trader puts the words "trade mark" on his goods, that means that the trade-mark is registered, and the words are used for the purpose of inducing that belief on the part of the public.

Cur. adv. vult.

March 1. STIRLING J., after stating that at the hearing of the motion he had no doubt that the get-up of the defendant's goods was calculated to deceive, continued as follows:—The doubt which was occasioned in my mind as to whether an injunction ought to be granted arose from the circumstance that the plaintiffs have throughout used packages on which are found in two places the words "Sen Sen—Trade Mark." [His Lordship then referred to the evidence above set out as to the right of the plaintiffs to the trade-mark, and continued:—]

Does that statement which is found on these packages amount to a misrepresentation such as to disentitle the plaintiffs to relief by way of injunction?

Now, how stands the law? I take it to be the law that a trader may still acquire the right to a trade-mark within the United Kingdom by user, and that the effect of that part of the Patents, Designs, and Trade Marks Act, 1883, which relates to trade-marks, is not to provide that no one shall have

(1) Chitty J., May 29, 1888, cited in Sebastian on Trade Marks, 3rd ed. p. 232.
(2) (1872) L. R. 7 Ch. 611.
(3) (1866) 36 L. J. (Ch.) 228.
(4) (1877) 5 Ch. D. 850.
(5) 67 L. T. 194.

a trade-mark unless he registers it in accordance with the Act, but only that a person using such a trade-mark shall not be entitled to sue in respect of it unless he has registered it. On that I refer to the observations of Cotton L.J. in the case of *In re Hudson's Trade Marks* (1), and of Chitty J. in *Barlow & Jones* v. *Johnson & Co.* (2)

Then, is the statement on goods such as these, that a particular mark is a trade-mark, a misrepresentation such as will prevent the plaintiffs from having the rights in respect of the get-up and so forth which they would otherwise have? My attention has been called to the 105th section of the Act. [His Lordship read s. 105, sub.-ss. 1 and 2.] Of course, if the plaintiffs are brought within the terms of that section they must be denied relief; and I go further, and say that without committing an offence under this section the plaintiffs might undoubtedly, to my mind, be guilty of such a misrepresentation as to disentitle them to relief in a court of equity. What is the offence which the Legislature desires to punish? Sub-sect. 1 says, as regards trade-mark: "Any person who . . . . describes any . . . . trade-mark applied to any article sold by him as registered which is not so shall be liable . . . . to a fine." The offence consists not in applying to any article sold by him a trade-mark, but in representing that that trade-mark is registered. Now the contrast is very strong between what is enacted in that respect and what is enacted with respect to a patent. If a person represents that any article sold by him is a patented article when no patent has been granted, then he commits an offence; but it is not said, if a person represents that he has a trade-mark and that trade-mark is not registered, that he commits an offence. But that is not the whole of the enactment. Sub-sect. 2 must be taken into consideration. That goes on to enact that, "A person shall be deemed for the purposes of this enactment to represent"—reading it shortly —"that a trade-mark is registered if he sells the article with the word 'registered,' or any word or words expressing or implying that registration has been obtained for the article."

Now, here the plaintiffs certainly have not put "registered"

(1) 32 Ch. D. 311. (2) 7 Rep. Pat. Cas. 395.

STIRLING J. 1899 SEN SEN COMPANY v. BRITTEN.

upon the article. Have they used words implying that registration has been obtained? That brings us very close to the consideration of the general question whether there is here a misrepresentation such as would disentitle the plaintiffs to relief in equity. It seems to me that the words which are found on these packages, "Sen Sen—Trade Mark," are susceptible of the meaning that the trade-mark referred to is a trade-mark with all its ordinary rights and incidents, including the right to sue, which would imply registration; but at the same time I do not think that they necessarily have that meaning. They may mean simply an intimation to a person who is intending to deal in these goods or to buy them that, if he desires to make sure that the goods he is buying come from the plaintiffs, he must see that they have upon them the words "Sen Sen," which the plaintiffs have adopted as one of the indications by which the genuineness of the article may be ascertained.

I have no evidence before me as to the effect which this representation has had upon anybody. I have nothing before me but the bare fact that these words appear on the packages. My attention was very properly called by counsel for the defendant to a case before Kekewich J. of *Lewis's* v. *Goodbody* (1), in which the learned judge used language which possibly might be read as an indication of an opinion on his part that, under these circumstances, it ought to be taken that there was a representation that the trade-mark existed with all the rights and privileges incident to it. I have made some inquiry with respect to that case, and have some reason to believe that the observations in question were delivered with reference to evidence which does not appear in the report; but, however that may be, I do not think that the learned judge meant to say that under all circumstances such a fact as I have before me, namely, the simple fact of a plaintiff having put a certain mark upon his goods with the addition of the words "Trade Mark," necessarily carries with it the implication that the trade-mark has been registered.

Therefore, upon the materials now before me, I am unable

(1) 67 L. T. 194.

to come to the conclusion that the plaintiffs have been guilty of such a misrepresentation as to deprive them of the right to an injunction, and, whatever happens at the trial, I think that an interlocutory injunction ought to be granted.

Solicitors for plaintiffs: *Keddey Fletcher & Fry.*

Solicitors for defendant: *Church, Rendell, Todd & Co., for W. S. Restall, Birmingham.*

H. B. H.

KEKEWICH J.

1898

Dec. 7.

CLIFFORD *v.* HOLT.

[1898 C. 3720.]

Ancient Lights—Prescription—Greenhouse—"Building"—Injunction—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

A greenhouse is a "building" within s. 3 of the Prescription Act (2 & 3 Will. 4, c. 71), and therefore, if it has ancient lights, may be protected by injunction against interference with the access of light.

Harris v. *De Pinna*, (1886) 33 Ch. D. 238, considered.

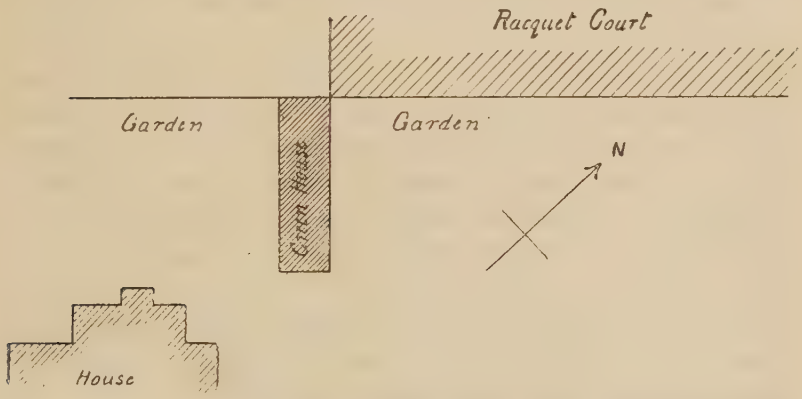
THE plaintiff, Ruby Clifford, was the occupier of a detached house and garden known as Manor Lodge, No. 2, Grove End Road, St. John's Wood, London, holding under a lease, of which a term of fourteen years remained unexpired, at the yearly rent of 230*l.*

At the back, or north-west side, of the house was the garden attached to it, bounded on its further or north-west side by a party wall or fence about 8 feet in height, dividing it from the garden of another house formerly No. 3, Grove End Road, but which had recently been purchased by the defendants, the trustees of the Marylebone Cricket Club. At the further end of the garden was a greenhouse, a portion of the party wall forming its northern end. The residence and greenhouse had been built upwards of twenty-five years, and all the windows of both were—and were admitted to be—ancient lights, the greenhouse having always had an uninterrupted light from the north and north-west.

About October 18, 1898, the defendants, the trustees of the Marylebone Cricket Club, without, it appeared, any notice under the London Building Act, 1894, began raising the party wall so as to form one side of a large racquet court which they were building on the garden of No. 3, Grove End Road. At the time the defendants, the trustees, commenced raising the wall the plaintiff was absent from home and was not aware of their intention to raise it. On his return on October 18, 1898, he found that the wall was being raised, and he then consulted his architect, who, on seeing that the raising of the wall was

causing considerable obstruction to the access of light and air to the plaintiff's greenhouse, wrote to the defendants' architects that unless they undertook to stop the work pending negotiations the plaintiff would have to apply for an injunction. No such undertaking being given, the plaintiff, on November 3, 1898, issued the writ in this action against the builders and the trustees, and served them with notice of motion, for an injunction to restrain the defendants, their servants, &c., from erecting or permitting to remain erected any wall, building, or other structure, so as to damage, injure, or obstruct any of the lights of the plaintiff's house or greenhouse, and from unlawfully raising or otherwise dealing with the party wall between the plaintiff's and defendants' premises or trespassing on the said wall.

The defendants' wall or building commenced from the northern corner of the greenhouse, and extended some 110 feet in a north-easterly direction. The plan below shews the position of the plaintiff's and defendants' premises respectively.



At the date of the issue of the writ and the service of the notice of motion, the defendants had raised the wall to a height of about 25 feet, their intention being to raise it to a total height of about 40 feet, which the plaintiff alleged would cut off the north or north-east light to his greenhouse and very much darken and injure the same, and would also interrupt the access of air to his premises generally, and render them of less value.

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By arrangement the motion for injunction stood over, and ultimately the action now came on for trial on oral evidence and without pleadings.

The substantial question argued was as to the obstruction caused by the defendants' building to the access of light to the plaintiff's greenhouse from the north-east. Evidence of obstruction of light was given by architects, surveyors, and others, also of injury to the marketable value of the plaintiff's premises.

Warrington, Q.C., and *P. F. Wheeler*, for the plaintiff. The evidence clearly establishes the obstruction by the defendants' wall of the access of light hitherto enjoyed by the plaintiff for his greenhouse, the lights of which are admittedly ancient lights. The plaintiff is entitled to sufficient light for any purpose for which he may require to use this building: for instance it is quite possible it may be converted into a studio. We are, therefore, entitled to the injunction we ask.

Renshaw, Q.C., and *Methold*, for the defendants. The real question is whether this greenhouse is a "building" within s. 3 of the Prescription Act (2 & 3 Will. 4, c. 71). (1) If not, the plaintiff is not entitled to the protection given by that Act. The section says "dwelling-house, workshop or other building"; the word "building" meaning some building ejusdem generis with a dwelling-house or workshop.

[KEKEWICH J. So Chitty J. appears to have decided in *Harris* v. *De Pinna*. (2)]

According to that decision the "other building" must be a building of a like character to a "dwelling-house or workshop." A greenhouse is clearly not of a like character.

Even assuming it is a "building" within the Act, the injury

(1) Sect. 3 of the Prescription Act (2 & 3 Will. 4, c. 71), is as follows: "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(2) 33 Ch. D. 238.

is very small and capable of being estimated in money, and therefore damages may be substituted for an injunction: *Shelfer* v. *City of London Electric Lighting Co.* (1)

As to the argument that this greenhouse may at some time or other be converted into a studio, and will then be entitled to light sufficient for that purpose, that is disposed of by *Martin* v. *Goble.* (2)

KEKEWICH J. The first question to be decided is whether this greenhouse is a "building" within s. 3 of the Prescription Act. That question is raised by the judgment of Chitty J. in *Harris* v. *De Pinna* (3), in which he says (4): "On the construction of that section, seeing that the words are 'any dwelling-house, workshop or other building,' it appears to me 'any building' must mean a building analogous to those mentioned, otherwise it would be useless to mention workshop or dwelling-house particularly. It would have been enough to have said 'any building.'"

With great respect to the learned judge, I do not think it helps one over the difficulty raised by the language of the section to say that the "building" must be a building "analogous to those mentioned," but I recognise that it is not every building—that is, everything built—that is within the section, and that you must have something which may fairly be coupled with "dwelling-house or workshop." The point is not the same as has arisen under other Acts, such as the Lands Clauses Consolidation Act, 1845, s. 92. In a case that came before me some time ago, but in a different connection, I took occasion to point out that the word "building" was a word of importance, and had been interpreted, in its connection with the word "house," in cases arising under the Lands Clauses Act. It seems to me that in *Salter* v. *Metropolitan District Ry. Co.* (5), a case in which I was myself counsel, Lord Justice, then Vice-Chancellor, James held that a greenhouse could be a "building" within that particular Act. That, however, does

(1) [1895] 1 Ch. 287, 316–7, 322–3.
(2) (1808) 1 Camp. 320.
(3) 33 Ch. D. 238.
(4) Ibid. 246.
(5) (1870) L. R. 9 Eq. 432.

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1898

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not carry us very far except as saying that a greenhouse may possibly be a "building."

What I have now to consider for the first time is whether a greenhouse is a "building" within the Prescription Act, that is to say, a building requiring access of light for the ordinary purposes for which light is required. You require light for a dwelling-house, workshop, or other building. You require it equally for a studio or a picture gallery, that is to say, for a building not being a dwelling-house or workshop. What Chitty J.'s judgment in *Harris* v. *De Pinna* (1) shews is that when a building is of such a character that access of light is of importance to it, it is in fact a "building," and that therefore the Legislature intended that there should be protection for that light if it has been enjoyed for an uninterrupted period of twenty years. He does not actually say so, but that is what I understand from his judgment.

Now here we have a greenhouse. If it were a studio—either an ordinary studio, or a photographic studio, or a picture gallery—detached from the house, it would be a "building." If it were a conservatory attached to the house, it would be part of a building. It is difficult to say more than that this is a "building"; I prefer to leave it an open question what other erection may come within that description.

The question of what constitutes a "building" within the Prescription Act came before me in *Attorney-General* v. *Queen Anne Garden and Mansions Co.* (2), the case of the Guards' Chapel. I had to consider whether a chapel was such a "building": and I had no doubt in my own mind that a chapel was a "building" within the Act. So, in my opinion, would be any erection which was being used for an assemblage of individuals, though not for sleeping and living there, such as a lecture-room. Therefore, in my judgment, this is clearly a "building" within the Act.

[His Lordship then, after considering the evidence, held that the defendants' wall caused a substantial obscuration of light to the plaintiff's greenhouse, and that the obscuration was of that material character that the Court ought to interfere; also

(1) 33 Ch. D. 238. (2) (1889) 60 L. T. 759.

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that the existence of the wall was sufficient to render the plaintiff's residence less marketable. His Lordship concluded:] But, apart from the question of general injury to the residence, it has been established to my satisfaction that the wall does interfere with the plaintiff's greenhouse, and on that ground he is entitled to the protection of the Court.

I therefore grant a mandatory injunction. The plaintiff does not make much of the trespass which is admitted; as to that I award him five shillings damages. He will also have the costs of the action.

Solicitors: *A. & A. C. Hughes; Marson, Son & Haigh, for Fellows, Rickmansworth.*

G. I. F. C.

KEKEWICH J. 1899 *Feb.* 11, 21.

In re BIRKS. KENYON *v.* BIRKS.

[1898 B. 1809.]

Will—Words—Issue—Gifts to—Several Gifts restricted to Children—Unqualified Gift—Canon of Construction.

Twelve distinct legacies contained gifts over to the issue of legatees dying in the testator's lifetime. Except in the case of the 11th legacy, the gift over contained qualifying words clearly restricting the class of issue to children. In the 11th case the gift over was unqualified:—

Held, that notwithstanding the canons of construction laid down in *Ridgeway* v. *Munkittrick*, (1841) 1 D. & War. 84, 93, and *Rhodes* v. *Rhodes*, (1859) 27 Beav. 413, 417, to the effect that the same word is primâ facie to be construed in the same way throughout a will, the Court was not bound to restrict the class of issue to children in the 11th case.

In re Warren's Trusts, (1884) 26 Ch. D. 208, 216, followed.

ADJOURNED SUMMONS.

By his will dated July 9, 1895, a testator, who died on June 17, 1897, gave (inter alia) twelve legacies with gifts over to the issue of legatees dying in his lifetime.

In the 1st, 2nd, 3rd, 4th, 5th, and 12th cases the gift over ran as follows: "If any of them—i.e. the legatees—shall die in my lifetime leaving lawful issue such issue shall have and be entitled to his her or their deceased parent or parents'

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share"—the word "either" being substituted for "any" in the 12th case.

In the 6th, 8th, 9th, and 10th cases the gift over ran: "If any of them shall die in my lifetime leaving lawful issue such issue shall have and be entitled to the legacy to which his her or their deceased parent or parents would have been entitled if living at my decease"—the word "either" being substituted for "any" in the 9th case.

In the 7th case the gift over ran: "If she—the legatee—shall die in my lifetime leaving lawful issue such issue shall have and be entitled to the said legacy in equal shares if more than one and if only one the whole to such one child."

In the 10th case the gift over ran: "I declare that in the event of the death of the said last-mentioned legatees or any of them in my lifetime leaving lawful issue then I direct that the legacy or legacies intended for him her or them so dying shall not lapse but such issue shall have and be entitled to the legacy to which his her or their deceased parent or parents would have been entitled if living at my decease."

In the 11th case, however, on which the present question arose, the gift over was as follows: "I bequeath to my cousin John Birks Pigott the legacy or sum of 5000*l.*, but in the event of his death in my lifetime leaving lawful issue I direct that the said legacy shall not lapse but such issue shall have and be entitled thereto in equal shares and proportions."

John Birks Pigott died on June 1, 1886, i.e., nine years before the date of the will. He left nine children, four of whom died before the date of the will leaving issue still living, two died before the date of the will without issue, and the remaining three were still living.

On April 30, 1898, the plaintiffs, the executors and trustees of the will, took out this summons to determine (inter alia) who were entitled to the sum of 5000*l.* primarily bequeathed to John Birks Pigott.

P. O. Lawrence, Q.C., and *J. G. Wood*, for the plaintiffs, stated the question.

Warrington, Q.C., and *John Dixon*, for a son of John Birks

Pigott. In this will "issue" means "children." In the 7th case this is clear from the words "such one child." In the other cases, with the exception of the 11th, the word "issue" is coupled with the word "parent." This restricts the class to children according to the rule in *Sibley* v. *Perry*. (1) In eleven gifts out of twelve the meaning is so restricted, and therefore, according to the canon of construction laid down by Lord St. Leonards in *Ridgeway* v. *Munkittrick* (2) and adopted in *In re Harrison's Estate* (3) and *Rhodes* v. *Rhodes* (4), the meaning must equally be restricted in the remaining case.

S. Dickinson, for a grandchild representing the grandchildren of John Birks Pigott. *Ridgeway* v. *Munkittrick* (2) and *In re Harrison's Estate* (3) were decisions of the Irish Court, and are not binding here. The so-called canon of construction has frequently been disregarded in the English Courts, and the word "issue" construed differently in different gifts: *Carter* v. *Bentall* (5); *Head* v. *Randall* (6); *Hedges* v. *Harpur* (7); *Williams* v. *Teale* (8); *Waldron* v. *Boulter* (9); *In re Corrie's Will* (10); *In re Warren's Trusts*. (11) In *Thompson* v. *Robinson* (12) the expression "nephews and nieces" was similarly treated. No general rule can be gathered from the actual decision in *Rhodes* v. *Rhodes* (4), and the canon is only obiter, and does not express the mature opinion of the judge. If the direction that the issue are to take the share which their parent would have taken if living at the testator's decease is introduced in this gift, it effects nothing. The parent had been dead nine years at the date of the will. The issue are the primary legatees of the share.

Foster Cooke and *H. C. Hawkins*, *Church*, *Dibdin*, *Micklem* and *Harman*, *T. B. Napier*, *E. F. Ball* and *Arthur Sims*, for parties not interested in this question.

(1) (1802) 7 Ves. 522.
(2) 1 D. & War. 84, 93.
(3) (1879) 3 L. R. Ir. 114.
(4) 27 Beav. 413.
(5) (1840) 2 Beav. 551, 558.
(6) (1843) 2 Y. & C. Ch. 231.
(7) (1846) 9 Beav. 479; (1858) 3 De G. & J. 129.
(8) (1847) 6 Hare, 239.
(9) (1856) 22 Beav. 284.
(10) (1863) 32 Beav. 426; (1866) L. R. 1 H. L. 30.
(11) 26 Ch. D. 208, 216.
(12) (1859) 27 Beav. 486.

KEKEWICH J.
1899
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Warrington, Q.C., in reply. The eleven clear gifts do not govern the present case, but they shew that the testator was thinking of "children" when he said "issue." The cases are discussed in the foot-notes in Jarman on Wills, 5th ed. pp. 949, 1281. *Carter* v. *Bentall* (1), *Head* v. *Randall* (2), *Hedges* v. *Harpur* (3), *Williams* v. *Teale* (4), *In re Corrie's Will* (5), *Thompson* v. *Robinson* (6), and *Waldron* v. *Boulter* (7) were special cases with special contexts, and in the last case the point was not argued, nor was *Ridgeway* v. *Munkittrick* (8) cited. *In re Warren's Trusts* (9) was the ordinary case of a marriage settlement with the usual power to appoint to issue generally, and a gift in default of appointment to issue properly confined to sons attaining the age of twenty-one years, or daughters attaining that age or marrying. Pearson J. read the instrument as an experienced conveyancer, and construed it accordingly.

In *Turner* v. *Mullineux* (10) and *In re Buckle* (11) the word "deductions" was construed to include "income tax" on the ground that the testator had in another part of his will shewn that he used the word in that way.

KEKEWICH J. The gift I have to construe is both short and simple, namely, "I bequeath to my cousin John Birks Pigott the legacy or sum of 5000*l.*, but in the event of his death in my lifetime leaving lawful issue I direct that the said legacy shall not lapse but such issue shall have and be entitled thereto in equal shares and proportions." About the construction of that gift alone I apprehend there could be no difficulty whatever. The draftsman knew what event he had to provide for—namely, the death of John Birks Pigott in the testator's lifetime leaving lawful issue—and he provided that in that event the 5000*l.*, which otherwise would have lapsed, should go to such issue—that is, all the issue generally; so that however many genera-

(1) 2 Beav. 551, 558.
(2) 2 Y. & C. Ch. 231.
(3) 9 Beav. 479; 4 De G. & J. 129.
(4) 6 Hare, 239.
(5) 32 Beav. 426; L. R. 1 H. L. 30.
(6) 27 Beav. 486.
(7) 22 Beav. 284.
(8) 1 D. & War. 84, 93.
(9) 26 Ch. D. 208, 216.
(10) (1861) 1 J. & H. 334.
(11) [1894] 1 Ch. 286.

tions of issue there were they would all take concurrently with their parents. It has been contended that I must not give the word "issue" that ordinary wide interpretation, because the testator has made his own dictionary or glossary, and in other parts of the will has used the word in a sense not extending to every generation of issue, but to one generation only—namely, children. I apprehend that there is no doubt that if I find such a dictionary or glossary in the context I must follow the testator's interpretation and construe the word "issue" in that way. I frequently have to do this, and no difficulty can arise if once that context is ascertained. The question is whether the testator has made any such dictionary. The counsel for the legatee's son contend that when the testator used the word "issue" he did not mean issue of every generation, but children only, and therefore that he must be taken to have used the word with reference to what was present to his mind. If so, I must construe the will according to that intention. In eleven different gifts the testator has restricted the meaning of the word "issue" to "children." Whether this restriction arises by the application of the rule in *Sibley* v. *Perry* (1) or in some other way is indifferent: the point is that the testator has used language in the particular gifts restricting the meaning of the word to children only.

Now let me venture on the somewhat hazardous task of construing this gift apart from authority. I should certainly hold that issue of every generation take. The testator has said in each of eleven different gifts, "Where I say issue in this gift I mean children." Then in the gift I have to construe, which is the last but one of the twelve gifts, he uses the word without any such qualification. Ought I to conclude that he means to similarly restrict the meaning in that case? Were I to follow the bent of my own mind I should say, "Certainly not. The true conclusion is just the contrary." The testator takes pains to explain in eleven cases that he means to restrict the word, and he omits and, it would seem, designedly omits that explanation in the remaining case. The general rule that applies when the testator has made his own dictionary is quite

(1) 7 Ves. 522.

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different. Here the testator has not said generally, "Where I use the word 'issue' I mean children"; but he has said in particular cases, "Where I use the word 'issue' in this gift I mean children." He has not made a dictionary, but merely a special definition in each particular case. That would be my own conclusion apart from authority.

It is said, however, that I am bound by authority, and therein lies the great difficulty of this case. The leading case on the point is *Ridgeway* v. *Munkittrick* (1), a decision of Lord St. Leonards. Apart from the judgment, to which I will presently refer, it is singularly like the present case. The term "issue" was used several times, and in each case its meaning was restricted to children. It was not like the case of one moiety given in one way and another moiety in another way. There were several gifts, and Lord St. Leonards notices that very point. The weight of the authority does not, however, lie in his construction of the particular will, but in the canon of construction which he lays down. (2) "The testator has over and over again translated 'issue' to mean 'children,' and this enables or rather compels me to put a particular construction on the word. It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." This language of Lord St. Leonards has been criticised more than once; but, having regard to the passages cited from Jarman on Wills, I think it better not to attempt it. I have also read the judgment in *In re Harrison's Estate* (3), a decision in the Irish Court thirty-eight years later. That case, if it stood alone, would have considerable bearing on the point; but having looked into it, I think that if *Ridgeway* v. *Munkittrick* (1) had not been before the Court they would have considered the question open. I cannot therefore look upon the decision as adding to the authority of *Ridgeway* v. *Munkittrick*. (1) If *Ridgeway* v. *Munkittrick* (1) binds me I need not look at the

(1) 1 D. & War. 84, 93. (2) 1 D. & War. 92.
(3) 3 L. R. Ir. 114.

later case; if it does not I am free from both. Then there has been one English case—namely, *Rhodes* v. *Rhodes*. (1) In that case Sir John Romilly M.R. found that on five separate occasions the testator had used the word "issue" as equivalent to children. It is true that no general rule can be gathered from the actual decision, but Sir John Romilly said in his judgment (2): "It is a canon of construction, that where the testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of his will, if it do not violate the sense." Lord Romilly's canon differs from that of Lord St. Leonards, and, critically construed, means something different; but no doubt Lord Romilly meant to express the same thing.

Before considering the other cases on the point, I will just notice the cases of *Turner* v. *Mullineux* (3) and *In re Buckle* (4), cited in reply. They are not of much assistance. They come within the class of cases where a testator has provided his own interpretation clause. In each case the testator had expressed himself in such a way as to shew that "deduction" included "income tax," and the Court followed his construction. On the other hand, I have the cases cited on behalf of the remoter issue. It is not necessary to refer to them all, because they all more or less differ from *Ridgeway* v. *Munkittrick* (5) in this point, namely, that, besides being decisions on special wills, they were cases in which there were only one or two gifts to be contrasted. In *Carter* v. *Bentall* (6) there were two moieties, and Lord Langdale M.R. says (7): "The word 'issue' may, and does often mean children, and more than children. The testator in one place accompanies the use of the word by expressions, which signify that on that occasion he means children only; but it does not follow, that in another place where the word is not accompanied by such expressions, the same limited meaning is intended." In that case Lord Langdale M.R. was evidently only dealing

(1) 27 Beav. 413.
(2) Ibid. 417.
(3) 1 J. & H. 334.
(4) [1894] 1 Ch. 286.
(5) 1 D. & War. 84, 93.
(6) 2 Beav. 551.
(7) 2 Beav. 558.

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with a gift of two moieties, and the case is distinguishable from the larger view adopted in *Ridgeway* v. *Munkittrick*. (1) Again, *Ridgeway* v. *Munkittrick* (1) has been cited in some cases, but not in others. The last case on the point is *In re Warren's Trusts*. (2) I need not say one word about the fitness of the learned judge to deal with the point, but I observe that *Ridgeway* v. *Munkittrick* (1), *Carter* v. *Bentall* (3), and *Rhodes* v. *Rhodes* (4) were all cited, and that in his judgment the learned judge referred to *Ridgeway* v. *Munkittrick*. (1) He sums the case up thus (5): "Am I then bound by authority to construe the word 'issue' in the former clause as meaning 'children' only, merely because I find that it is expressly restricted to children in the latter clause? I think I am not. I think I am bound to look at the whole of the deed, and if I find that it was not intended to restrict the meaning of the word in the earlier clause, I must give the word in that clause its proper unrestricted meaning. I am not bound to restrict the meaning unless there would otherwise be a manifest inconsistency, or I should be defeating the plain intention of the parties." There is no such inconsistency binding me to restrict the meaning in the present case, nor is there any plain intention in that behalf unless I am bound by the general canon to infer it.

As pointed out in the argument, the gift I have to construe is of a character quite different from that of the other gifts. It might well be that the testator intended to provide for all the issue of John Birks Pigott though not of the other legatees. I will take the 12th gift by way of example. That is a substitutionary gift in case the parent dies leaving lawful issue. In the gift before me that is not the case. The gift to the issue is direct, and it may well be that the testator did not intend to restrict it to children. Pearson J. did not refer to all the authorities, but they were brought to his notice by a very industrious and able counsel, so that he clearly had them in his mind. In *In re Warren's Trusts* (2), though admittedly a

(1) 1 D. & War. 84, 93.
(2) 26 Ch. D. 208.
(3) 2 Beav. 551.
(4) 27 Beav. 413.
(5) 26 Ch. D. 216.

weaker instance than *Ridgeway* v. *Munkittrick* (1), Pearson J. thought he was not bound by Lord St. Leonards' canon. *In re Warren's Trusts* (2) was decided in 1884. I think I am at liberty to do what Pearson J. did, and say that I am not bound by authority to hold that "issue" means children in the present case; and, if so, I should hold that it means issue generally.

There is, however, one point which has not been argued before me. *Ridgeway* v. *Munkittrick* (1) was decided many years ago, and it has found its way into the text-books. *Rhodes* v. *Rhodes* (3), again, is now matter of ancient history, and has been cited in many cases. I ought not, even if not bound by those authorities, to depart from the rule laid down in them, if I think it has been adopted by the profession and applied to the construction of wills out of Court. But many cases have been cited in which the rule has been departed from. *In re Warren's Trusts* (2) has been before the profession for fifteen years, and the point must be considered open to some doubt. I have no reason to suppose that *Ridgeway* v. *Munkittrick* (1) has been relied on by draftsmen or trustees acting without the assistance of the Court. The question is one deserving settlement by a higher tribunal, but in the meantime I hold that the word "issue" in this gift means issue in the larger sense.

Solicitor for plaintiffs and another party appearing: *Charles Capron, for Kenyon & Son, Thorne.*

Solicitors for the son of John Birks Pigott: *Andrew, Wood & Purves, for Newman & Bond, Barnsley.*

Solicitor for the grandson: *A. W. W. Holt.*

Solicitors for other parties: *Simpson & Co.; Prior, Church & Adams; Crowders & Vizard; T. A. Dennison & Co.; Steadman & Van Praagh.*

(1) 1 D. & War. 84, 93. (2) 26 Ch. D. 208.
(3) 27 Beav. 413.

G. R. A.

KEKEWICH J.

1899

March 11.

In re CHATARD'S SETTLEMENT.

[1898 C. 0135.]

Practice—Jurisdiction—Payment out of Court—Infants Domiciled in France—French Law—Right of Father to Receive Children's Money.

Where infants who were French subjects and domiciled in France had become absolutely entitled to a fund in court, and it appeared that by the law of France their father as their legal guardian was entitled to receive and give legal discharges for all moneys coming to them during minority:—

Held, that the Court was not bound to pay out the fund to the father as of right, but that evidence ought to be adduced shewing that the fund would be applied for the benefit of the infants.

PETITION.

By a settlement made on the marriage of François Guillaume Eugène Chatard and Sarah his wife (formerly Sarah Barnes, spinster), and dated October 10, 1845, a sum of 2000*l.* 3*l.* 5*s.* per cent. Reduced Annuities, which had been transferred into the names of trustees, was settled upon trust during the joint lives of the husband and wife to pay the annual produce to the wife as a separate and inalienable provision for her during her coverture, and after the decease of either of them upon trust to pay the annual proceeds to the survivor of them during his or her life, and after the decease of the survivor upon trust for such one or more exclusively of the other or others of the children or remoter issue of the marriage as the husband and wife should by deed, or the survivor of them should by deed or will, appoint.

There were issue of the marriage two daughters, one of whom, Sarah Ann Eugénie Chatard, intermarried with Louis Eugène Ballot, who was a French subject and domiciled in France, and died in the lifetime of her mother, Sarah Chatard, leaving two children of her marriage with Louis Eugène Ballot her surviving, namely, a daughter, Fernande Ballot, born on August 24, 1881, and a son, Charles Ballot, born on November 14, 1886.

In the year 1866 Robert Malcolm Kerr, the sole surviving trustee of the settlement of October 10, 1845, paid and transferred the trust fund into court under the provisions of the Trustee Relief Act; and by an order dated December 12, 1866, the interest accruing on the fund in court was directed to be paid to Sarah Chatard during her life for her separate use.

François G. E. Chatard died on February 14, 1893.

Sarah Chatard died on June 3, 1898, having by her will, dated July 13, 1896, in pursuance of the power given to her by the settlement, appointed and directed that the trust fund should be held in trust for Fernande Ballot and Charles Ballot, to be equally divided between them, share and share alike.

The funds subject to the settlement were now represented by a sum of 200*l.* 0*s.* 3*d.* New Consols and 26*l.* 12*s.* cash standing to the credit of this matter.

This petition was presented by Fernande Ballot and Charles Ballot, both of Paris, by Louis Eugène Ballot, their father and lawful guardian and next friend, praying that the funds in court might be dealt with by paying thereout a sum of cash due to the legal personal representative of Sarah Chatard and the costs of the applicants, and dividing the residue in moieties, and paying one moiety to Louis Eugène Ballot as the guardian of Fernande Ballot, and the other moiety to Louis Eugène Ballot as the guardian of Charles Ballot.

By the 14th paragraph of the petition it was stated as follows: "By the law of France the said Louis Eugène Ballot as the legal guardian of your petitioners is entitled to receive and give legal discharges for all monies coming to his children during their minority."

By the suggestion of his Lordship the case was argued in the first instance on the footing that this statement was strictly proved.

Ingpen, for the petitioners. If paragraph 14 of the petition is accepted as an accurate statement of the French law, it is submitted that the father of the petitioners, as their guardian, is entitled as of right to have the funds belonging to his infant children paid to him. The authorities support this view. In

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the case of *In re Crichton's Trust* (1) Kindersley V.-C. ordered that a sum of stock belonging to a Scottish infant should be transferred to his curator dative appointed by the Scottish Court. That case was followed by the Master of the Rolls in Ireland in *In re Ferguson's Trusts.* (2)

In re Brown's Trust (3) seems to be directly in point. There, upon evidence substantially to the same effect as the allegation in the present case, the Court ordered the money of an infant to be paid to his father as his guardian entitled to receive it according to the law of Prussia. *In re Hellmann's Will* (4) may be cited as an authority against me. There, two infants were domiciled in Hamburg, and Lord Romilly ordered payment to one of them who had attained full age according to the law of the domicil, but declined to order payment to the other, who was a minor according to both the English and the foreign laws, but said that it might be paid to him when he came of age by the English or the foreign law whichever should first happen. But that case is observed upon in Simpson on Infants, 2nd ed., by E. J. Elgood, p. 254, where it is said that "personal property in England belonging to an infant domiciled abroad will be paid to him, when he is by the law of his domicil entitled to receive it, or to his guardian, if the latter be so entitled." *In re Brown's Trust* (3), *In re Crichton's Trust* (1), and *In re Ferguson's Trusts* (2) are there cited as authorities for that proposition, and it is added that *In re Hellmann's Will* (4) "would not, it is submitted, now be followed."

The cases of *In re Willoughby* (5) and *In re Bourgoise* (6) shew that the Court acts upon similar principles in reference to the appointment of guardians to infants domiciled abroad.

It is submitted, in accordance with those decisions, that the Court in the present case will not consider the benefit of the infants, but will pay the money to the guardian as of right to be dealt with by him according to French law.

Stewart-Smith, for the respondent, the sole surviving trustee

(1) (1855) 24 L. T. (O.S.) 267.
(2) (1874) 22 W. R. 762.
(3) (1865) 12 L. T. 488.
(4) (1866) L. R. 2 Eq. 363.
(5) (1885) 30 Ch. D. 324.
(6) (1889) 41 Ch. D. 310.

of the settlement. The authorities do not bear out the proposition contended for, but the ordinary rule and practice of the Court applies, namely, that the Court will not pay away the money of infants without being satisfied that it will be applied for their benefit. The cases as to the Scottish infants, *In re Crichton's Trust* (1) and *In re Ferguson's Trusts* (2), may be dismissed from consideration, because by the Scottish law a curator dative has to give security duly to account for all sums received on behalf of the minor, and the Court, in making the payment to the curator, relied upon that fact. The report of *In re Brown's Trust* (3) is meagre: the decision was on a petition for the direction of the Court for the guidance of the trustee, and it cannot be treated as an authority in a case like the present where the fund was paid into court under the Trustee Relief Act. The case of *In re Hellmann's Will* (4) shews that the Court will retain control over the legacy of an infant who is a minor both by the law of his domicil and the law of this country. Where a stranger comes to the Court having full jurisdiction over the fund, and asks the assistance of the Court to pay it to him, he must conform to the domestic rules of the tribunal to which he applies. If the father as guardian were suing the trustee in England, the law of capacity would govern the case, and it might be sufficient for him that by the foreign law he was competent to give a discharge; but where the fund is in custodiâ legis he must go further, and satisfy the Court that it ought to give effect to the right which he might enforce against a private individual. If the Court should think that in the interests of the infants it is better that the fund should be retained where it is until they can give receipts for it, I submit there is nothing in the cases cited to shew that the Court cannot exercise its discretion in that way.

Ingpen, in reply. The principle of the cases is that the Court has no jurisdiction whatever over a foreign subject. The question becomes simply one of the title of the person who applies for payment. If according to the foreign law his title to receive the fund is clear, the Court has no power to say that it will not

(1) 24 L. T. (O.S.) 267.
(2) 22 W. R. 762.
(3) 12 L. T. 488.
(4) L. R. 2 Eq. 363.

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part with the fund because infants are interested in it. There is no jurisdiction in this Court to withhold funds from foreign subjects who substantiate a claim to them as of right by the foreign law.

KEKEWICH J. This case has been argued at my suggestion on the footing that the 14th paragraph of the petition is strictly proved. [His Lordship read the paragraph, and continued :—]

I apprehend that, assuming that statement to be true, it would be quite right for me, if I thought fit, to direct the payment as asked. And further, if the fund had not been paid into court the trustee would have had a legal discharge if he had paid the money of the infants to their guardian. But it seems to me that the question now is whether I am bound to do that. Here are two infants who are entitled under a settlement to the fund which has been paid into court. If I am bound to pay the fund to their guardian, of course I must do my duty. If I am not so bound, then I have a discretion in the matter which I must exercise on proper materials, which are not at present before me.

The point is put as one of principle supported by some authority. In two of the cases which have been referred to, namely, *In re Crichton's Trust* (1), and *In re Ferguson's Trusts* (2) before the Master of the Rolls in Ireland, the infants whose property was dealt with were Scottish. In each case the infant had reached the age of puberty, as established by the law of Scotland, and though not sui juris in England was competent to give a discharge in Scotland. That, of course, in itself makes a difference. But further than that, according to Scottish law, as was proved in the Irish case and was capable of proof in the English case, security is required to be given by the curator truly to account for all sums received on behalf of the minor. That seems to me to make a considerable difference, sufficient to distinguish those cases from the present one. From the other cases which have been cited I do not derive much assistance. In the case of *In re Brown's Trust* (3) a fund devolving upon an infant under a settlement

(1) 24 L. T. (O.S.) 267. (2) 22 W. R. 762. (3) 12 L. T. 488.

made according to the law of Prussia was ordered to be paid to the father as guardian, upon evidence that "by the law of Prussia he was entitled in that character to receive the fund and administer it during the infant's minority." That is exactly what the petition says here, and Wood V.-C., on hearing the evidence, made the order. What evidence there was which influenced the judge it is not easy to say. The report of the case is a very short one. No argument is reported on the part of the counsel for the petitioner, and no one appeared on behalf of the respondent. I do not think it is a case which can be relied on as establishing a principle. *In re Hellmann's Will* (1) is still further off. Mr. Ingpen properly called my attention to it, though it is not altogether in his favour. The editor of Simpson on Infants suggests that it ought not to be followed. I think that, at all events for the present purpose, it ought not to be regarded. It was the case of a petition under Lord St. Leonards' Acts (22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38) which enabled trustees to apply to the Court of Chancery for the opinion or direction of the judge respecting the management or administration of trust property. I think I ought to bear in mind how petitions under the Acts were commonly drawn, namely, by stating all such facts as would induce the Court to make the order desired, and the petition in the case in question may have been drawn upon that basis. Apart from the fact that the Master of the Rolls in that case did not take the same view as the petitioners did, I think that a decision on a petition under those Acts cannot possibly be treated as a decision that a person in the position of this French guardian is entitled as of right to have the fund in court paid to him. It appears to me that I ought to consider whether when the fund is handed over to the guardian it will be properly applied for the benefit of the infants, and whether it is not better that it should remain here and be paid to them when they attain their majorities. If, for instance, it were proved that they were amply provided for, why should I pay it over so that it may be spent in a way which, for aught I know, may not be for their benefit? Evidence may be forthcoming which will satisfy me; but I am not asked to pay out on that footing,

(1) L. R. 2 Eq. 363.

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but to pay it to this guardian as a matter of right. Assuming that he is entitled to give a receipt, I should be perfectly within my right if I paid it to him, and nobody could say I had acted contrary to law; on the other hand, it seems to me that having the custody of the fund for the infants, I ought not to pay it over unless I think that in their interest that ought to be done. Mr. Ingpen also cited two other cases as to the appointment of guardians. They may be useful on that branch of the law, but I do not think they apply with sufficient directness to the case before me.

Mr. Ingpen has not referred me to a class of cases—to which I can refer only by memory—in which the Court has had to consider whether, in the case of a foreign lunatic being entitled to a fund in court, the curator or other person appointed to act, and acting under the control of the foreign court, was entitled to have the money paid him on behalf of the lunatic. The case with which we are best acquainted is *In re Barlow's Will* (1), but there are several other cases, both in this Court and in the Court of Appeal (2), and, unless I am in error, the Court has always required to be satisfied that the money is to be paid over to the foreign official for some purpose to which it is his duty to apply it.

Accordingly, I shall be willing to consider any evidence which may be laid before me in reference to the proposed application of the money, and the case may be put in the paper again for that purpose.

[The matter was again brought before his Lordship in chambers on Monday, March 29, but as no satisfactory evidence was then offered to enable him to exercise his discretion he directed that (subject to any application on further evidence) the costs should be paid out of the fund, and the balance carried over to the separate account of each infant, and the income accumulated.]

Solicitors: *P. Collings & Co.; Claudius George Algar.*

(1) (1887) 36 Ch. D. 287.

(2) See *In re Brown*, [1895] 2 Ch. 666; *In re De Linden*, [1897] 1 Ch. 453; *In re Knight*, [1898] 1 Ch. 257; cited in Lewin on Trusts, 10th ed. pp. 416, 417.

C. C. M. D.

In re G. (INFANTS).

[1899 G. 118.]

KEKEWICH J.

1899

March 15, 22.

(IN CAMERA.)

Infants—Maintenance—Education—Bringing up—Immoral Home—Trustee's Discretion—Control of Court—Guardian—Schoolmistress—Landlord of Lodgings.

A trustee who, in pursuance of a trust to maintain, educate, and bring up infants, brings them up in an immoral home, commits a breach of trust.

Bequest of a fund to a wife during her widowhood, "she maintaining, educating, and bringing up" the testator's unmarried infant sons and unmarried daughters. The widow, while duly maintaining and educating the children, lived in adultery with a married man in the home she provided for them:—

Held, that this was a breach of the trust imposed on her, and that the Court could administer the fund.

Castle v. *Castle*, (1857) 1 De G. & J. 352, followed.

A TESTATOR settled a trust fund subject to certain prior payments thereout upon the trust following, namely: "Upon trust to pay the annual income of my trust estate to my said wife during her life if she shall so long continue my widow she maintaining educating and bringing up such of my children as shall be under the age of 21 years and shall not have been married and also maintaining such of my daughters as being of the age of 21 years shall not be or have been married."

Subject thereto the estate was given to the sons who attained the age of twenty-one years and the daughters who attained that age or married as tenants in common, with a substitutionary gift to the issue of any child predeceasing the testator and leaving issue living at his death. The testator's wife, two of his brothers, and his eldest son on attaining twenty-one were appointed executors and trustees of the will.

The testator died on August 26, 1894, leaving seven children, whose ages at their last birthday before the date of the summons were as follows, namely: Primus, 20; Secunda, 19; Tertius, 17; Quarta, 16; Quinta, 14; Sexta, 11; and Septima, 7.

The widow, while duly maintaining and educating the

KEKEWICH J. 1899 G. (INFANTS), *In re.*

children, was living in adultery with a married man in the home she provided for them.

On January 14, 1899, the brother trustees and the five younger children, by those trustees as their next friends, took out a summons against their mother and the two elder children asking (inter alia) for the removal of their mother from the office of guardian of the five younger children and the appointment of a proper guardian, or alternatively the appointment of a joint guardian, proper provisions for custody, liberty to the brother trustees to retain out of income and apply such sum as the Court should allow for the maintenance and education of the five younger children, and as far as necessary administration of the trusts of the will.

The three elder children were fully aware of all the circumstances, and the two elder children were strongly opposed to any interference with their home. All the children except Tertius, who was not allowed to live at home, were on extremely affectionate terms with their mother and her paramour, the latter of whom they treated as their stepfather.

The judge desired before making any order that the question of his power to deal with the fund, which produced about 417*l.* a year net, should be argued.

Martelli, for the plaintiffs. A trust is clearly imposed on the widow, and the Court can administer it: *In re Booth* (1); *Castle* v. *Castle* (2)—a similar case of misconduct; *Longmore* v. *Elcum.* (3)

P. F. S. Stokes, for the defendants. The mother is properly maintaining, educating, and bringing up the children, and the Court cannot interfere with her discretion merely on account of her immorality. The quantum and mode of maintenance is discretionary, and the mother is not liable to account: *Lambe* v. *Eames* (4); *Thorp* v. *Owen* (5); *Jodrell* v. *Jodrell.* (6) I admit an obligation to maintain.

[KEKEWICH J. That is equivalent to a trust. Might the

(1) [1894] 2 Ch. 282.
(2) 1 De G. & J. 352.
(3) (1843) 2 Y. & C. Ch. 363.
(4) (1871) L. R. 6 Ch. 597.
(5) (1843) 2 Hare, 607, 612.
(6) (1851) 14 Beav. 397.

mother exercise her discretion by bringing the children up as thieves ?]

She is not bringing them up to immorality. *Castle* v. *Castle* (1) was a case of abandonment. She is still willing to maintain the children. This was not so in the cases cited against me.

Martelli, in reply. Even if the mother is " maintaining and educating " the children, she is not " bringing them up " properly. The fact that the two elder children approve of their home in its present condition is strong proof of this, and a most cogent ground for the Court's interference.

Cur. adv. vult.

March 22. KEKEWICH J. The construction of the will, though requiring careful examination of the language, does not present legal difficulties of moment, but the practical questions arising on any construction are so serious and embarrassing that the subject has received unusually earnest attention.

There is only one clause in the will which need be construed. Following a residuary gift in trust for conversion and investment with provision for a reserve fund to meet loss, there is this direction to the trustees: " And subject as aforesaid upon trust to pay the annual income of my trust estate to my said wife during her life if she shall so long continue my widow she maintaining educating and bringing up such of my children as shall be under the age of 21 years and shall not have been married and also maintaining such of my daughters as being of the age of 21 years shall not be or have been married." Subject to this the estate is given to the children, sons taking at twenty-one and daughters at that age or on marriage. It was urged on behalf of the children and not denied on behalf of their mother that the language just quoted imposes on the latter an obligation enforceable in this Court, but the precise character of that obligation requires to be examined and defined.

It matters not how the enforceable obligation ought technically to be defined. It may be regarded either as a trust or as an

(1) 1 De G. & J. 352.

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implied contract. There is a close analogy between cases of this character and those where a gift of property has been coupled with an obligation to repair. Some cases of the latter class have recently been commented on by the Lord Chief Justice in *Blackmore* v. *White* (1), and he seems to treat the right of enforcing such obligation as resting on implied contract, and that view is at least consistent with the judgment in *In re Skingley* (2), which for some time was treated, and perhaps may still be treated, as the leading authority on the subject. North J.'s decision in *In re Booth* (3), and that of Knight Bruce V.-C. in *Longmore* v. *Elcum* (4), both of which are cases of the class here under consideration, treat the obligation as founded in trust and enforceable by exercise of the jurisdiction which the Court has over trustees. But they equally treat the obligation as enforceable, and, as already mentioned, that is not denied. The question, therefore, is what is the nature and extent of the obligation, and that gives rise to some serious considerations.

First comes the question what meaning is to be attributed to the expression "maintaining educating and bringing up"? I entirely agree that, although it of course includes providing such an adequate supply of house-room, food, and clothing as can reasonably be expected from a mother, having regard to the station in life of herself and children and the means available for the purpose, it cannot be restricted to that; and indeed this is sufficiently shewn by the use of the word "educating," which must be taken to mean that the children are also to have a proper education, that is proper having regard to the same circumstances as are regarded with reference to food and clothing. It is difficult to give any definite additional meaning to the words "bringing up," yet in common parlance they are taken to denote something not covered by "maintenance and education," which latter word is generally used in a limited sense, the sense I mean of such instruction as is given at school, or by those who occupy the position of schoolmaster at home in that character. But whether it depends on

(1) [1899] 1 Q. B. 293.
(2) (1851) 3 Mac. & G. 221.
(3) [1894] 2 Ch. 282.
(4) 2 Y. & C. Ch. 363.

"bringing up" or not, I have no doubt that the clause must be read as if the word "properly" were there, and that again "properly" must be construed with regard to the position in life of those to whom reference is made. I ventured during the argument to illustrate this by saying that a mother would not be bringing up her children properly if she were teaching them to be thieves. That seems to me to be obviously clear. I think it is equally obvious and clear that the bringing up need not be such as to introduce the children to the criminal class in order to offend against the obligation imposed by the will. In my opinion a bringing up directly tending to make the children familiar with immorality and with familiarity to induce a fondness for and practice of it would be equally objectionable. Here on the mother's own confession we know that she is not only living with a man to whom she is not married, but that she is continuing to do so after she has discovered that he has a wife of his own. I am not sitting as a court of morals, nor am I exercising punitive jurisdiction, and there is no occasion to use words of censure or reproof, but I distinctly hold that a woman thus living in adultery cannot be treated as properly bringing up her children, however much she may do in the way of making them a comfortable home and giving them a proper education. The answer is that only the three elder children know the real facts, and that the two elder of these are content, while the four younger children have been taught to regard the man as their stepfather and believe him to occupy that position, and have the affection for him which, as he apparently returns it, is natural under such circumstances. The answer does not satisfy me. I do not think that even if they are kept in ignorance, and the affection continues, the mother can be regarded as fulfilling her obligation. But there is at least a strong probability that they will sooner or later discover the truth, and I am invited to believe, and indeed to hope, that as and when they do, they, like the two elder children, will be content to live in a home of immorality such as I have mentioned. My duty is to regard and, as far as possible, to provide for the welfare of the children, and I cannot think that I should be performing that duty if,

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any alternative being possible, I allowed these consequences to ensue. This conclusion is founded on principle and common sense, and does not require the support of authority; but one authority was cited which deserves notice, namely, *Castle* v. *Castle*. (1) A careful examination of that case shews that the Court was only dealing with the provision (2) commencing with the words, "that if from any cause it should be found necessary or advisable to discontinue the business of the said hotel," and read in that light the strong remarks in the judgments have a direct bearing on the case in hand. They shew that, in determining what is for the welfare of those whose welfare the Court has to protect, moral considerations have weight, and the social misconduct of a mother in charge is a reason for interfering with her.

Here follows a question of greater difficulty and not less serious practical importance, namely, what is the beneficial interest which is thus placed under the control of the Court to be administered by it instead of by the mother for maintaining, educating, and bringing up the children? The father left his whole estate to his wife during life or widowhood, and the annual income of that estate, which is proved to be now 417*l*., is not, I conclude, likely in the future to exceed that sum. The widow has not apparently any other income. Can the whole of this be properly taken from her and applied for the benefit of the children elsewhere? In the other cases in which the jurisdiction now invoked has been exercised there have been words to express the intention of the testator that the person on whom the obligation of maintaining others is cast is herself intended to derive a personal benefit. The language has been "she maintaining thereout," or, as in *In re Booth* (3) and *Longmore* v. *Elcum* (4), "for her use and benefit and for the maintenance," &c., from which there was a slight variation in *Castle* v. *Castle* (1), where the mother was allowed to retain a third, though the other two-thirds were appropriated to the children. Such words are absent here; but I cannot doubt that the effect of the gift is the same as if they were present.

(1) 1 De G. & J. 352.
(2) Ibid. 354.
(3) [1894] 2 Ch. 282.
(4) 2 Y. & C. Ch. 363.

The gift is to the widow coupled with an obligation; but it would, I think, be making that obligation too extensive to hold that it can be enforced even to the exhaustion of the beneficial character of the gift. It may be observed that in marrying again she loses all; but then of course it is assumed that she will be maintained by her husband; and on the other hand, as the children attain majority and the daughters marry, the obligation diminishes, and ultimately she is given the whole income for her own benefit. What proportion of the income is to be retained by her, and what applied for the benefit of the children, must be carefully considered with other details of a scheme for the future "maintenance education and bringing up" of the children; but I intend to hold distinctly that, assuming the custody of all the children to be taken from the mother by reason of her misconduct, and their maintenance, education, and bringing up to be provided for elsewhere than under her roof, she will still be entitled to receive so much of the income as between her and the children, and having regard to the social position of the parties and the amount of available fortune, is adequate to her own personal maintenance and support.

Solicitors for plaintiffs: *Gush, Phillips, Walters & Williams.*
Solicitor for defendants: *M. A. Orgill.*

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[1897 D. 950.]

Mortgage of Reversion—Tenant for Life and Remainderman—Arrears of Interest—Foreclosure and Redemption—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2—*Waste by Tenant for Life—Dilapidation of Buildings—Depreciation of Marsh Lands—Damages—Statute-barred Debt—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16)—*Retainer.*

A testator, who died in 1878, devised some cottages and marsh lands upon trust for his wife for life, she out of the rents and profits keeping "the premises in good tenantable repair and condition," and after her death upon trust for C. in fee. In 1882 C. mortgaged his reversion in fee to the widow, who was in receipt of the rents and profits of the property as tenant for life. She died in 1897, and her executors brought an action of foreclosure against C., who had made no payment either of principal or interest since the date of the mortgage, and who set up the Statutes of Limitations. At the trial C. submitted to the usual judgment for foreclosure with arrears of interest limited to six years prior to the date of the writ, but counter-claimed damages against the estate of the tenant for life for non-repair of the cottages and depreciation of the marsh lands, alleging that the latter had been continuously mown against all custom, and had thereby been greatly impoverished, and offered to redeem on the footing that any damages awarded him should be set off in account against what was due on the mortgage, and contended that on redeeming he was only bound to pay six years' arrears of interest prior to the date of the writ. The testator had in 1874 granted a seven years' lease of the marsh lands, with a covenant by the lessee not to mow them oftener than once in any one year, but to keep them during the term in good condition, and the tenant for life in granting subsequent leases of the same lands had inserted covenants as to mowing similar to that in the testator's lease. The cottages were out of repair and the marsh lands had been depreciated to some extent by mowing:—

Held, that C. was entitled to damages for non-repair of the cottages, but not for depreciation of the marsh lands, the tenant for life in her dealings with the latter having followed the course that had been adopted by the testator:

Held, also, that C. on redeeming was not limited to six years' arrears of interest prior to the date of the writ, but must pay all arrears of interest with principal and costs from the date of the mortgage.

Du Vigier v. *Lee*, (1843) 2 Hare, 326, and *Mason* v. *Broadbent*, (1863)

33 Beav. 296, discussed; and *Edmunds* v. *Waugh*, (1866) L. R. 1 Eq. 418, and *In re Marshfield*, (1887) 34 Ch. D. 721, followed on this point.

The tenant for life had lent C. sums of money by way of loan without security, which loans were statute-barred at the date of her death:—

Held, that her executors were not entitled to retain the damages assessed for non-repair of the cottages in discharge of the statute-barred loans.

Courtenay v. *Williams*, (1844) 3 Hare, 539, discussed on this point.

T. L. COPPEN, by his will dated April 16, 1874, devised unto and to the use of his wife Elizabeth Coppen, (the plaintiff) James Fortescue, and C. Coppen, all his real estate whatsoever and wheresoever, with their appurtenances, upon trust to permit and suffer his said wife to receive and take the rents and profits thereof during her life for her separate use, "she my said wife out of such rents and profits keeping the buildings on the said premises fully insured . . . . and also keeping the said premises in good tenantable repair and condition"; and after the decease of his said wife the testator declared that the plaintiff James Fortescue and the said C. Coppen, and the survivor of them, should stand seised of his said real estate, with the appurtenances, upon trust as to his freehold marsh lands, comprising about fifteen acres, situate in the parish of Dagenham, in the county of Essex, and the six cottages erected by him on part thereof, and together known as "New Years," upon trust for his nephew (the defendant) T. L. Coppen in fee simple. And the testator appointed his said wife Elizabeth Coppen sole executrix of his said will.

The said testator died in June, 1878, and his said will was duly proved by his widow, the said Elizabeth Coppen. The said Charles Coppen died in 1886.

By deed dated April 13, 1882, the defendant T. L. Coppen mortgaged his reversion in fee in "New Years" to the tenant for life, Elizabeth Coppen, to secure 500*l.* advanced by her to him with interest at 5 per cent. per annum; and by a deed dated February 7, 1884, the defendant T. L. Coppen executed a second mortgage of the same property in favour of the defendant W. Temple to secure 400*l.* and interest.

Elizabeth Coppen received the rents and profits of all the testator's property during her life. She died in March, 1897, having by her will appointed the plaintiffs E. Dingle and

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James Fortescue her executors, who duly proved the same. No payment was made to Elizabeth Coppen during her life by the defendant T. L. Coppen either on account of principal or interest under his said mortgage, and on her death he refused to make any payment, and alleged that nothing was due. Thereupon the plaintiffs commenced this action, claiming the usual account and foreclosure.

The defendant T. L. Coppen by his defence did not admit the plaintiffs' mortgage, alleged that nothing was due thereunder, and set up the Statutes of Limitations of 1833 and 1874. By his counter-claim he claimed possession and a conveyance of the property, and also damages against the estate of Elizabeth Coppen on the ground that she had allowed the cottages to become dilapidated and the marsh lands to be exhausted and impoverished.

The plaintiffs in reply joined issue on the defence, did not admit the allegations in the counter-claim, and also alleged that Elizabeth Coppen during her life had lent the defendant T. L. Coppen by way of loan sums amounting to 220*l.* without security, and they claimed to retain and set off any damages that might be awarded the defendant T. L. Coppen on his counter-claim against the 220*l.*

The defendant T. L. Coppen in rejoinder did not admit the loans, and pleaded the Statute of Limitations (21 Jac. 1, c. 16). By his particulars of damage he alleged as to the cottages numerous items of repairs, and on this head he claimed 325*l.*; and as to the marsh lands he alleged that, at the time of the death of the testator, they were rich grazing land, and that during the life of Elizabeth Coppen they were continually mown against all custom, and thereby exhausted and impoverished, and the absence of proper restrictions and covenants in the tenants' leases was a loss to the land, and on this head he claimed 350*l.* By his further particulars of damage he alleged that Elizabeth Coppen ought to have inserted in the leases with her tenants covenants to the following effect: "The tenant shall not mow the marsh land comprised in the demised premises or any part thereof, but shall feed the same with cattle, nor shall he use the same for any other purpose than

feeding, and shall feed them in a proper course of husbandry and with a proper and sufficient number of cattle."

Shortly before the action came on for trial the defendant T. L. Coppen executed a mortgage on the property in favour of his solicitors, Messrs. Wrensted & Sharp, to secure their costs, and at the trial they were formally added as defendants.

Astbury, Q.C., and *H. L. Fraser*, for the plaintiffs. A foreclosure action is an action for the recovery of land within s. 2 of 3 & 4 Will. 4, c. 27, and ss. 1 and 2 of 37 & 38 Vict. c. 57, and time does not begin to run, in the case of a reversion, until the property falls into possession: *Pugh* v. *Heath* (1); *Harlock* v. *Ashberry* (2); *Hugill* v. *Wilkinson* (3); *In re Owen.* (4) The plaintiffs are entitled to judgment for foreclosure with interest admittedly limited to six years' arrears prior to the date of the writ.

J. G. Wood, for the defendant Coppen. On the authorities I cannot resist, and must submit to judgment for foreclosure, but with interest limited to six years prior to the date of the writ. On the counter-claim——

Astbury, Q.C. There is a preliminary objection. The defendant Coppen has from first to last resisted the plaintiffs' claim, and now submits to judgment for foreclosure. He has, therefore, no longer any interest in the property and cannot maintain his counter-claim unless he offers to redeem. This he can only do by amendment and on terms.

J. G. Wood. I am not bound to amend. Under the foreclosure judgment, which is only the usual order nisi, I have an equity to redeem. That gives me sufficient interest in the property to maintain the counter-claim.

BYRNE J. I do not think so. You must elect now whether you will amend or maintain the counter-claim as it stands. I will give leave for all necessary amendments.

J. G. Wood. Then I ask leave to amend the counter-claim, offering to redeem, and on the footing that any damages that

(1) (1882) 7 App. Cas. 235.
(2) (1882) 19 Ch. D. 539.
(3) (1888) 38 Ch. D. 480.
(4) [1894] 3 Ch. 220.

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may be awarded may be set off in account with the plaintiffs and deducted from their mortgage.

The counter-claim was accordingly treated as amended on this footing, and the action proceeded.

It appeared from the evidence that the testator had in 1874 granted a lease of the marsh lands, along with some arable land called "French's," to one Charles Bates. This lease contained a covenant by Charles Bates not to mow the marsh lands oftener than once in any one year; but during the whole term to keep the demised lands, arable as well as pasture, in good state and condition, and cultivate the same according to the best and most improved system of husbandry adopted in the neighbourhood. On the expiration of the lease in 1881, Charles Bates continued in possession of the demised premises as yearly tenant to Elizabeth Coppen upon the terms of the expired lease until 1889, when Elizabeth Coppen granted a three years' lease of the same premises to C. P. Bates, the son of Charles Bates. This lease contained a covenant as to mowing similar in terms to that contained in the old lease of 1874. In 1892 Elizabeth Coppen granted a seven years' lease of the same premises to one Venables with covenants by the lessee substantially to the same effect as those above mentioned. The evidence as to the alleged custom, and as to the present state of the cottages and marsh lands, is sufficiently noticed in the arguments and judgment. It was also proved that Elizabeth Coppen had lent the defendant Coppen without security sums amounting to 120*l.*, which were admittedly statute-barred.

J. G. Wood. The defendant Coppen is entitled to maintain this claim against the executors of Elizabeth Coppen for damages for waste committed or permitted by her: *Woodhouse* v. *Walker* (1); and on the evidence he is entitled to substantial damages both in respect of the cottages and the marsh lands. I ask for 320*l.* on the cottages, and 200*l.* on the land.

Astbury, Q.C., and *H. L. Fraser.* The defendant Coppen, who now claims to redeem, can only do so on payment of all that is due under the plaintiffs' mortgage—that is, he must

(1) (1880) 5 Q. B. D. 404.

pay all arrears of interest, with principal and costs, from the date of the mortgage: *Edmunds* v. *Waugh* (1); *In re Marshfield.* (2) As to the cottages, Elizabeth Coppen was not bound to keep them in substantial repair, but only in such a state of repair as kept them habitable for the class of persons who would occupy them—that is, labourers: *Proudfoot* v. *Hart* (3); *Dashwood* v. *Magniac.* (4) The evidence of our experts shews that but a small outlay, if anything, is necessary to put the cottages in good repair; and the fact that all the cottages have always been occupied from the death of the testator down to the present time affords strong evidence that they are in good tenantable repair. With regard to the marsh lands we submit the claim of the defendant Coppen entirely fails. In *Dashwood* v. *Magniac* (4), Chitty L.J. (then Chitty J.) in giving judgment refers to the case of waste by alteration of the course of husbandry or cultivation, and says (5): "In this case also the course of dealing with the land adopted by the settlor appears to afford the governing rule as to the rights of a tenant for life." That observation applies to this case. Elizabeth Coppen in her leases of the marsh lands has followed the course of dealing adopted by the testator. Her estate, therefore, is not liable for the depreciation, if any, occasioned by the tenants mowing the lands, and no such custom has been proved as that alleged by the defendant Coppen in his particulars. Lastly, assuming some damages are assessed, they are damages which in their nature are not arbitrary, but may be the subject of set-off: *In re Compton.* (6) The defendant Coppen is claiming against the estate of Elizabeth Coppen in a court of equity and must do equity: *In re Cordwell's Estate.* (7) He has assets of Elizabeth Coppen to the extent of 120*l.* in his hands, and the plaintiffs are entitled to say to him, "Pay yourself the damages out of the assets in your hands," or they may retain the damages in discharge of his statute-barred debt: *Courtenay* v. *Williams* (8); *Jeffs* v. *Wood* (9); *Mills* v. *Fowkes.* (10)

(1) L. R. 1 Eq. 418.
(2) 34 Ch. D. 721.
(3) (1890) 25 Q. B. D. 42.
(4) [1891] 3 Ch. 306.
(5) Ibid. 328.
(6) (1885) 30 Ch. D. 15.
(7) (1875) L. R. 20 Eq. 644.
(8) 3 Hare, 539.
(9) (1723) 2 P. Wms. 128.
(10) (1839) 5 Bing. N. C. 455.

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J. G. Wood, in reply. There can be no set-off or retainer of the statute-barred debt in this case. If an action had been brought against Elizabeth Coppen in her lifetime, she could not have set off these loans, and her executors are in no better position. As to the arrears of interest on the mortgage, the price of redemption in an action by the mortgagor to redeem is the same as it would be under like circumstances in an action by the mortgagee to foreclose; and if the mortgagee on foreclosure is entitled to no more than six years' arrears of interest, the mortgagor on redeeming is only bound to pay the same, i.e., six years' arrears of interest: *Du Vigier* v. *Lee* (1); *Sober* v. *Kemp* (2); *Sinclair* v. *Jackson* (3); *Mason* v. *Broadbent* (4); *In re Slater's Trusts*. (5) In such a case the mortgagee cannot get more than six years' arrears of interest unless he can tack the debt under a covenant or bond: *Elvy* v. *Norwood* (6); and arrears under a covenant or bond would now be limited to twelve years: *Sutton* v. *Sutton*. (7) No right to tack exists or is claimed in this case.

Ingpen, for the second mortgagee. If damages are awarded, the second mortgagee claims on redeeming the plaintiffs to have the benefit of the damages in taking the account between himself and them.

[BYRNE J. No. You have made no such claim by your defence and are not entitled to the benefit of any damages.]

On the other points judgment was reserved.

Dec. 21. BYRNE J. This action is a simple action for foreclosure not asking for payment under the covenant. The defendant Coppen put in a defence and counter-claim. It is immaterial to consider the defence because, so far as it was founded on a claim of title free from the mortgage, it was abandoned at the trial, and the plaintiffs do not claim to be entitled to bring more than six years' arrears of interest into the account, the debt on the covenant being statute-barred and six years' arrears being admittedly all that can be brought into account in fore-

(1) 2 Hare, 326.
(2) (1847) 6 Hare, 155.
(3) (1853) 17 Beav. 405.
(4) 33 Beav. 296.
(5) (1879) 11 Ch. D. 227.
(6) (1852) 5 De G. & Sm. 240.
(7) (1882) 22 Ch. D. 511.

closure proceedings. In addition to claiming relief upon the footing of being absolutely entitled to the mortgaged property, the defendant Coppen, by his counter-claim, asked for damages for the neglect, non-repair, and depreciation of the premises by Elizabeth Coppen, the tenant for life. I allowed the necessary amendments to be made to enable me to determine the substantial questions between the parties, and the advisers of the plaintiffs and the defendant Coppen have agreed to certain matters which will enable a proper judgment to be taken when the questions which have been argued and those upon which evidence has been taken have been disposed of.

The first question is, whether or not Elizabeth Coppen during her lifetime kept the premises "in good tenantable repair and condition"; and, if not, at what amount ought damages for her neglect to be assessed. The amount (if any) so assessed, it is agreed between the plaintiffs and the defendant Coppen, is to be brought into the account to be taken as between them in reduction of the amount otherwise payable by the defendant Coppen on redemption by him of the plaintiffs' security. In the event of the plaintiffs being redeemed by the second or third mortgagee, the amount so assessed is to be paid to the defendant Coppen on his redeeming. In the event of the plaintiffs not being redeemed at all, the amount is not to be paid to any person. The second question is, whether or not the plaintiffs are entitled to the benefit of a statute-barred debt of 120*l.* owing by the defendant Coppen to the plaintiffs, as executors of Elizabeth Coppen, by way of discharge or reduction of the amount assessed as damages. The third question is, whether or not the plaintiffs are, in taking the account as between them and the defendant Coppen, entitled to charge the full arrears of interest upon the mortgage including such arrears as are statute-barred. It is agreed that the third question is to be determined as though it had arisen in an action by the defendant Coppen to redeem the plaintiffs.

As to the first of these questions, it is alleged by the defendant Coppen that the late tenant for life, Elizabeth Coppen, failed to comply with the obligation imposed upon her by the will in certain respects mentioned in the particulars which have

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been furnished. In the first of these sets of particulars it is alleged that "the said Elizabeth Coppen referred to in the pleadings in this action and counter-claim neglected and omitted to do the following repairs to the buildings in question, namely," and then follows an enumeration of certain repairs which it is alleged she ought to have done, and which she did not do. Then "as regards the land being exhausted and impoverished, &c. The land in question was at the time of the death of the late Thomas Linsell Coppen, and at the time the said Elizabeth Coppen came into possession thereof, rich grazing land, the same having been regularly fed, whereas since the said Elizabeth Coppen came into possession thereof, and during the time that she retained possession thereof and up to the date of her death, the said land was continually mowed (against all custom) and thereby exhausted and impoverished, and the absence of proper restrictions and conditions in the leases and agreements with the tenants as to treatment of the land is a loss to the land and property." Further particulars were required, and they were to this effect: "The said Elizabeth Coppen ought to have inserted, but failed to insert in the leases or agreements with her tenants, covenants of or to the purport or effect following—that is to say, the tenant shall not mow the marsh land comprised in the demised premises, or any part thereof, but shall feed the same with cattle, nor shall he use the same for any other purpose than feeding, and shall feed them in a proper course of husbandry and with a proper and sufficient number of cattle." I think those are all the particulars that have been furnished. In reference to the cottages and fences I have heard a good deal of evidence which, as usual in such cases, is very conflicting. I have had regard to the nature of the property—small labourers' cottages—to what has been said about original defective construction, to the condition of the cottages in 1878, when Elizabeth Coppen came into possession as tenant for life, to what has been said about repairs which have actually been done from time to time, to what has been done since action, and have weighed as best I can the evidence of the different witnesses, of the various estimates of what would be a proper expenditure for putting

the cottages and fences into good tenantable repair and condition, and I have come to the conclusion that the damages on this head ought to be assessed at the sum of 85*l*. On the second head of damages I think the defendant Coppen has failed to make out his case in accordance with the particulars. Three years and a half before his death the testator himself granted a seven years' lease to Mr. Charles Bates containing the following clause: "And further that the said C. Bates his executors or administrators shall not nor will mow the said meadow or pasture lands oftener than once in any one year, but shall and will during the whole of the said term keep the said land hereby demised, arable as well as pasture, in good state and condition and cultivate the same according to the best and most improved system of husbandry adopted in the neighbourhood, and in particular shall not nor will grow upon part of the said land white straw crops two years in succession or without an intervening green crop."—I ought to say there was included in this lease, not only the marsh land in question, but certain other land called "French's," which is arable land.—"And also that the said Charles Bates his executors or administrators shall or will during the continuance of the said term repair, amend, cleanse and keep the messuage, and other buildings hereby demised, and also the hedges, ditches, banks, gates, posts, rails, and fences of and belonging to the demised premises in, by, and with all needful and necessary cleansings and emptyings, reparations and amendments whatsoever." That tenant was in possession and continued in possession until the end of the lease, which expired in 1881, but for some years Mr. Bates continued in occupation on the same terms, and was succeeded by his son Mr. Charles Poole Bates, who, on September 16, 1889, entered into agreement for lease of the same property for three years, and in that agreement there was contained a clause to the effect that he would not mow the said meadow or pasture lands oftener than once in one year in similar terms, I will not say literally, but similar terms to those under which his father had held. Since Mr. C. P. Bates has given up possession another tenant has been in possession on terms which I think are substantially in the same form. The

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defendant Coppen has failed to prove any custom of the country as suggested in his particulars. It has been proved to my satisfaction that there have been two ordinary methods of dealing with land of this kind. One method is by mowing and afterwards feeding or manuring; the other method is by not mowing at all and by feeding. The evidence seems to me to shew that one is just as good a course of dealing with the property as the other, if properly carried out; and, moreover, I think that it has been shewn that the testator in this case, who was himself a good agriculturist, thought fit and elected so to let the land as that the tenant might have a right to mow the land. It was also in evidence that he had himself once mowed it. It is to be observed that the real question about waste in the present case is whether the tenant for life has fulfilled the obligation put upon her by the will of the testator. When the testator died there was the lease in existence granted by the testator himself, and which presumably he, being a judge of such things, recognised as a proper lease, and by which he allowed the tenant to deal with the land in a manner which the defendant Coppen now says was contrary to the custom. I have already said I think the defendant Coppen's evidence entirely fails to prove any such custom at all. What was proved was that in certain tenancies, leases and agreements for leases, landlords had put in a clause that the land should not be mown but should be fed only. I must guard myself by saying that I do think the evidence shews that there has been a certain amount of deterioration of the land by reason of what has taken place, but that was not in consequence of any such acts or defaults on the part of the tenant for life as alleged by the defendant Coppen; and, moreover, I think the defendant Coppen has entirely failed to shew that there was any duty imposed upon the tenant for life to insert in the agreements or leases any such term or covenant as he suggested by the second set of particulars which have been put in. The evidence also shews that the land has been improving since the present tenant has held; and having regard to the case sought to be established by the defendant Coppen, that not being a charge against the tenant for life of having neglected during her life to

enforce the covenants which actually existed on the part of the tenant, but being put upon an entirely different ground, I think that so far as the land is concerned his case fails, and I do not award any damages in respect of that.

Now I come to the second question. The plaintiffs say they are entitled to treat the amount assessed by way of damages as being repaid to the extent of the statute-barred debt of 120*l.*, or to retain an amount of assets otherwise applicable in payment of damages in discharge of that debt. They admit they could not set off, but they say that this is not set off, but analogous to the right to retain a legacy in discharge of a statute-barred debt. They say they have no authority establishing their contention; but they refer to *Courtenay* v. *Williams* (1) as shewing the principle upon which they assert this claim, and as fairly enumerating the previous cases upon which such a contention could be raised. Now *Courtenay* v. *Williams* (1) was a case of a legacy, and the question was whether, where there was a statute-barred debt due from a legatee, the legatee was entitled to claim payment without bringing into the estate the amount of his indebtedness to the estate. At page 551 the passage commences upon which the plaintiffs rely: "The Statute of Limitations that governs the present case is 21 Jac. 1, c. 16, which takes away the remedy against the debtor, unless the action be brought within six years after the cause of action arose; but it leaves the right untouched, differing in this respect from a more recent Statute of Limitations by which the right as well as the remedy is barred. In accordance with this construction of the Act, it has been repeatedly decided, and is settled law, that if a creditor, by means of a lien or other lawful means, can pay himself without resorting to an action against the person of the debtor, he may lawfully do so." And then the learned judge refers to *Spears* v. *Hartly* (2), in which it was held that, there being an existing lien, although the Statute of Limitations ran against the demand, the creditor having obtained possession of the goods on which he had a lien might hold them for that demand by virtue of the lien. He refers also to *Higgins* v.

(1) 3 Hare, 539.
(2) (1800) 3 Esp. 81.

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Scott (1) and to *Mills* v. *Fowkes* (2), a well-known instance of the case where, if a debtor pays money to a creditor, without directing the appropriation, the creditor, having acquired a right to apply it, may apply it in payment of a debt barred by the Statute of Limitations. Then he says, "I shall assume, for the purposes of the argument in this case, as being favourable to the plaintiff, that the right which the law gives to the creditor, having a lien on the goods or other property of the debtor, does not enable a debtor effectually to plead, by way of set-off, a debt barred by the Statute of Limitations; that is, I shall assume that the plaintiff might reply the Statute of Limitations in answer to such a plea, as in *Chapple* v. *Durston* (3) and *Field* v. *Bezant*. (4) The question then is, whether the present case is to be governed by the principle of the former or of the latter cases? If the executor had made himself personally liable to the payment of the legacy, or if the object of the suit had been to charge the executor personally, the principle of the latter cases might possibly have governed this case. But this is not a suit for that purpose; it is a suit to recover a legacy out of assets—that is, claiming a portion of the assets in the hands of the executor; and the claim is not made in any other way. The case is the same as if the assets were in the hands of the Accountant-General. Now, to say that the right remains, and that the remedy only is barred, is, in a case like this, the same thing as saying that the legatee has already in his hands, to the amount of his debt, those assets of the testator which he seeks by his suit. Several ways of putting the case may be suggested in support of the argument on the part of the executors." Then the learned judge goes on to say how it might be put: "They may say to the legatee, 'We admit your right to the legacy; you have assets of the testator in your hands; pay your legacy pro tanto out of those assets,' as in *Jeffs* v. *Wood* (5) and *Campbell* v. *Graham*. (6) Again, the executor might say, 'You ask for a portion of the assets of the testator; but you are yourself a

(1) (1831) 2 B. & Ad. 413.
(2) 5 Bing. N. C. 455.
(3) (1830) 1 C. & J. 1.
(4) (1833) 5 B. & Ad. 357.
(5) 2 P. Wms. 128.
(6) (1830) 1 Russ. & My. 453.

debtor to the testator's estate, and his assets are diminished pro tanto by your default: it is against conscience that you should take anything out of the estate until you have made good what you owe to it'; and the equity of a trustee to impound the interest of a cestui que trust in the trust fund under such circumstances is clear," and he refers to several cases. "To such a case, the rule, that he who would have equity must do equity, would apply by way of rebutter to the plaintiff's demand." Now it is to be observed that the decision in that case is a decision having relation to a legatee, it being a bounty intended by the testator; and the same remark applies to the case of *Jeffs* v. *Wood* (1), to which I will not further refer now; and the learned judge, in *Courtenay* v. *Williams* (2), expressly recognizes that the debtor cannot plead, by way of set-off, a debt barred by the Statute of Limitations. Then the case of *Courtenay* v. *Williams* (2) came before the Court of Appeal. (3) I do not think I need go through what was said. The decision was affirmed, but at page 207 the Lord Chancellor says this: "Now, it is quite certain that the rule of law is such as I have over and over again stated. The debt exists, but the remedy alone is barred. The debt existed in this case, but no action could be brought to recover the money: that is perfectly clear. The Act of Parliament only goes to this extent: it only says that no action shall be brought to recover any debt after the expiration of six years from the time the debt was incurred. It does not extinguish the debt; the debt still continues to exist; and if there are any equitable circumstances under which the debt may be available to the party to whom it is due, without reference to an action, the party is entitled to the benefit of the debt. Now, the question is, whether that applies to a case of this description. What is the case? The debt was due to the testator, and was a debt due at the time of his death; it was a part of the assets of the testator. A party holding a part of the assets of the testator claims a legacy. No action could be brought for that legacy. He is entitled

(1) 2 P. Wms. 128. (2) 3 Hare, 539.
(3) (1846) 15 L. J. (Ch.) 204.

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to be paid that legacy out of the assets of the testator. He has a part of those assets in his hands. This executor, therefore, I think, is entitled to say, 'Pay yourself out of that portion of assets in your own hands.' I think that is the true principle to be applied to a case of this description. I think it does not come within the law of set-off. Set-off applies only to the case of mutual debts. This is not the case of mutual debts. There is a debt due from one party—not a debt due from the other. The executor is in possession of assets. He is to distribute those assets according to the will of the testator. Part of the assets are in the hands of the party who claims another portion of the assets. The executor says, 'You have assets sufficient to satisfy your demand: apply them for that purpose.' That was the rule laid down in a case, not indeed barred by the Statute of Limitations, but in a case cited at the bar, in the course of this argument." I think that was the very case of *Jeffs* v. *Wood* (1) to which I have referred, although the Lord Chancellor does not mention it. What, then, do these decisions amount to? To my mind they come to this, that in the case of a legacy, the person indebted to the testator's estate is not entitled to claim that legacy unless he treats the legacy in one way or other as being pro tanto satisfied, or being wholly satisfied, as the case may be, by the amount due from him to the testator, although barred by the Statute of Limitations. Mr. Astbury, who argued the point with his usual ingenuity, was unable to refer me to any authority which would make it applicable to a case like the present, where there being a statute-barred debt due by a person to a testator, that testator being dead, an action is brought against his executors in respect of waste committed during the lifetime. If this had been a simple action brought for waste against the tenant for life during her lifetime, it would have been no answer to say, "But you are indebted to me." Of course that would have been simple set-off. Is there really any difference now? If a right exists at all, it appears to me that it must be a right existing by reason of set-off either legal or equitable. In point of fact that is the way in which the case is pleaded, although

(1) 2 P. Wms. 128.

the ingenuity of counsel sought to put it the other way. Counsel very properly admitted he was bound to say he could not put it on the ground of set-off; but what it comes to is, he thought he could find another equity or equitable principle by which he might get the benefit of a set-off. I am of opinion there is no foundation for the claim. In the absence of authority, I am not going to be the first to decide that there is any such right as is claimed in this respect.

Now upon the other point Mr. Wood has referred me to the earlier cases, and has invited me rather to accept certain dicta which are to be found in them than dicta which are to be found in later cases. The first case is *Du Vigier* v. *Lee* (1), and the passage I am going to refer to is to be found on page 334. *Du Vigier* v. *Lee* (1) was a case of a bill of foreclosure; and it was decided that, although no more than six years of interest might be due upon the mortgage, still the whole amount of statute-barred interest could be recovered by means of tacking the specialty debt arising out of the covenant contained in a mortgage or out of a collateral bond or covenant. At page 334 Wigram V.-C. says: "It was also argued for the plaintiffs that a foreclosure suit is not a suit for the recovery of money within the meaning of the 42nd section of 3 & 4 Will. 4, c. 27, for that the object of the suit was simply to foreclose the equity of redemption, and that the option of redeeming the estate was solely for the benefit of the mortgagor. This view of a foreclosure suit is opposed to that of the Vice-Chancellor of England in *Dearman* v. *Wyche* (2), and unless the 42nd section of the Act is to become a dead letter as to mortgages, I confess the argument is opposed to my own opinion also. It is perfectly true, that a bill to redeem a mortgage (which was relied upon at the bar as furnishing an analogy for the present case) cannot, in any sense of the expression, be treated as a bill to recover money; and, as a general proposition, I think the relative rights of mortgagor and mortgagee are the same in a bill to redeem as in a bill to foreclose, at least as to the price of redeeming the mortgage. But the fallacy of the plaintiffs' argument consists in assuming that, in

(1) 2 Hare, 326. (2) (1839) 9 Sim. 570.

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a suit to redeem the mortgage, the Court would necessarily compel the mortgagor to pay all the arrears of interest, without reference to the statute 3 & 4 Will. 4, c. 27. I do not accede to that proposition. I think, that in order to determine the price of redemption upon a bill to redeem a mortgage, the Court ought to inquire what the terms of redemption would be in a suit to recover the mortgage money out of or by means of the charge upon the land; and if, on the result of that inquiry, the Court should find that in a suit for foreclosure, or other suit seeking to affect the land, no more than six years' interest would be recoverable by the mortgagee, I think it would be bound to fix the same limit in determining the price of the redemption in a suit to redeem." Now, there can be no doubt that that is an expression of opinion of Wigram V.-C. to the effect that, if a bill is brought to redeem, in order to determine the price of redemption, the Court ought to inquire what the terms of redemption would be in a suit to recover the mortgage money by means of the charge. That is the first case. Then, in *Sober* v. *Kemp* (1) the same learned judge says (2): "It has always appeared to me, that the terms on which a mortgagor or those claiming under him are entitled to redeem must be the same, whether they are to be ascertained in a suit for redemption or for foreclosure. It is truly said, that a plaintiff seeking equity must do equity; but in determining what is equity, the question is, what are the duties or the liabilities which his situation at the time of instituting the suit imposes, and not whether he is plaintiff or defendant on the record." I cannot help thinking the learned judge is regarding the suit for redemption as being equivalent to an action for recovery of money within the meaning of the 42nd section. Then, in *Sinclair* v. *Jackson* (3), also a foreclosure action, the Master of the Rolls says (4): "As to the Statute of Limitations, I should be deciding against all the authorities, if I did not hold that a foreclosure suit is within it; for though it is in form a suit to exclude an equity, it is really a suit to recover either land or money. The mortgagee has a legal right to recover the land,

(1) 6 Hare, 155.
(2) Ibid. 160.
(3) 17 Beav. 405.
(4) Ibid. 410.

but this Court interferes and prevents him from doing so, upon the mortgagor paying the money charged upon it. It is, therefore, in fact, a suit to recover money; and so it is laid down in *Dearman* v. *Wyche* (1), *Du Vigier* v. *Lee* (2), and other cases." In the course of his judgment he says (3): "I have already expressed an opinion, that the question is the same in a suit to redeem as in a suit to foreclose, that is, the amount charged on the land is the same, but different equities may undoubtedly arise as connected with the one form of suit from those which may arise in the other. A suit to foreclose is a suit to recover money within the statute 3 & 4 Will 4, c. 27, s. 42, which enacts that no arrears of interest shall be recoverable but within six years. Now, strictly, a suit to foreclose is not a suit to recover money, but to exclude a right given to the mortgagor by the rules of the Court. But the statute does not say that no arrears shall be recovered in such a suit, but in *any* suit whatever, the words being, not 'an action or suit for the recovery of such interest,' but '*any* action or suit.' And if the mortgagor pays off principal and interest, and the mortgagee receives twenty years' arrears of interest, and not merely six years, in or by means of a foreclosure suit, it is clear, that the case comes within the 42nd section of the statute; and so it is laid down in *Hunter* v. *Nockolds* (4); *Hughes* v. *Kelly*. (5) As to that, then, there can be no question." Then he goes on to the question of tacking, and he deals with the question of tacking another debt upon another security, and he says: "There is this difference between a suit for foreclosure and one for redemption: in the former the mortgagee seeks to recover what is charged upon the land, or to foreclose the mortgagor; but that is a very different thing from the mortgagor seeking to redeem and to restrain the mortgagee from enforcing his legal rights, when the Court may impose upon him this condition, and decline to interfere in his favour, except upon payment of everything which is due to the mortgagee." So that the learned judge points out clearly the distinction between the

(1) 9 Sim. 570.
(2) 2 Hare, 326.
(3) 17 Beav. 412.
(4) (1849) 1 Mac. & G. 640.
(5) (1843) 3 D. & War. 482.

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two cases, and he shews that the Court may in a suit for redemption impose terms upon which and without which he will not be held entitled to have the benefit of his equitable right. Then in the case of *Mason* v. *Broadbent* (1), which was a case where there had been a sale of the estate by a trustee for a mortgagee under a power of sale, and the mortgagor brought a suit to recover the surplus money, the Master of the Rolls held that the mortgagee could not retain more than six years' arrears of interest out of the purchase-money; and he says (2): "It would be an anomalous state of things to say, that the day before the power of sale was exercised, the sale could have been stopped, and that the mortgagor could have redeemed the property by payment of the principal and six years' interest, but that the day after the sale he is obliged to pay interest from the date of the deed for twelve, thirteen, or fourteen years." That being the state of the authorities, and the neat point apparently never having come up for decision, the case arose of *Edmunds* v. *Waugh* (3), which came before Kindersley V.-C. In that case there had been a sale under a power of sale in a mortgage deed by the trustees of the mortgagee, and the proceeds of sale were paid into court in a suit for the administration of the mortgagee's estate; and there being nearly twenty years' arrears of interest due on the mortgage, exceeding in amount the fund in court, the trustees petitioned for payment out of the funds to satisfy such arrears, and the assignee of the mortgagor was served with the petition. The Vice-Chancellor says (4): "As I am clearly of opinion in favour of the mortgagee on the first point, that this is not a suit to recover interest under the 42nd section, it is not necessary to consider the effect of the numerous cases which have been referred to on the other points," and then after reading the 42nd section of the Act in question, he says: "The question is whether the proceeding now before me is a suit to recover interest within the reasonable meaning of that term as used in this section. If there had been no suit, and the money had remained in the hands of the mortgagees, they

(1) 33 Beav. 296.
(2) Ibid. 301.
(3) L. R. 1 Eq. 418.
(4) Ibid. 419–21.

would have been entitled to retain out of it the principal money, and all the interest they claimed; and the mortgagor could only have got any part of it out of their hands by filing a bill to compel repayment to him of the surplus money. I do not mean to express any opinion on the point whether, on any such proceedings as those in *Mason* v. *Broadbent* (1), the mortgagee would be entitled to interest for six years only, or to the whole interest. Assuming that he would be entitled to six years' interest only, the state of things here is, that, there being a suit to administer the estate of the mortgagee, the money was paid into court in that suit." Then he holds that the fact of the money being paid into court makes no difference, that the matter has to be dealt with just as though the money still remained in the hands of the mortgagee, and he says: "It appears to me that the highest ground that the assignee can take is to ask to be regarded as coming to recover the surplus money, and insisting upon only six years' interest being retained by the mortgagee. Assuming that to have been the case, such a suit could not be regarded as one to recover interest, as a suit to recover interest would necessarily be instituted by the person entitled to the interest, that is, the mortgagee." Now, if that statement of the law be correct, it is clear that an action for redemption is not a suit to recover money within the meaning of the 42nd section, to which I have already referred. Then he refers to the case of *Mason* v. *Broadbent* (1), and he says: "It appears to me, however, that the attention of the Master of the Rolls was not by the argument specifically called to the precise terms of the 42nd section, and his Lordship seems to have assumed that if it had been a bill for redemption the mortgagee would only have been entitled to six years' arrears of interest, and to have considered that the case before him must be regarded as if it had been such a suit. I am bound to say that, with all deference, I cannot concur in the conclusion that a bill by a mortgagor to recover the surplus money comes within the terms of the 42nd section as being a suit by which arrears of interest are sought to be recovered"; and then follows this observation upon the statute: "Moreover,

(1) 33 Beav. 296.

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it does not appear to me to come within the spirit of the Act, which, it must be remembered, is an act taking away existing rights, and which must be construed with reasonable strictness. The intention of the Legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then come to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid less culpable than the omission of the mortgagee to demand and enforce payment of it?" Now, like Kay L.J. (then Kay J.) in *In re Marshfield* (1), I confess I am not able to resist the reasoning and logic of Kindersley V.-C. in *Edmunds* v. *Waugh*. (2) The truth is this. Before the passing of the Act in question, there were certain rights as between a mortgagor and a mortgagee in existence; and, in respect of the recovery of arrears of interest, the section in question has affected the right of the mortgagee when coming to recover money, but it has not affected the right of the mortgagee in cases where he has exercised his power of sale and holds the proceeds, or his right where the mortgagor comes to redeem and take away from the mortgagee his legal rights. I think, therefore, that the true view is that, in a suit to redeem, there is no such right as that contended for in the present case on behalf of the defendant Coppen. I think that disposes of all the points raised in the case. Technically there would have been some difficulty in determining all these points, but both parties very sensibly allowed me to determine them in order to save the parties a great deal of subsequent expense and litigation. The defendant Coppen must have the general costs of the counter-claim except so far as they have been increased by his claim in respect of the

(1) 34 Ch. D. 721. (2) L. R. 1 Eq. 418.

marsh lands, and the plaintiffs' costs in respect of the marsh lands will be taxed and deducted from the defendant Coppen's costs of the counter-claim, and any balance of costs coming to him under the counter-claim must be set off against the costs of the action payable by him.

Solicitor for plaintiffs: *J. Greenfield.*
Solicitors for defendants: *Wrensted & Sharp; J. Turner.*

H. L. F.

SANTLEY *v.* WILDE.

[1897 S. 4429.]

Mortgage—Clog on Equity of Redemption—Notice to Pay Off Principal.

S., the sub-lessee of a theatre, had an option to acquire the reversion of the head-lease on paying 2000*l.* within a limited time. W. agreed to advance the money on the terms of the loan being repaid with 6 per cent. interest, and secured by a legal mortgage, which was also to provide for payment to W. of one-third of the clear net profit rental of the theatre. The mortgage executed in pursuance of this agreement was for the whole of the term acquired by S. less one day, and contained a covenant by her for repayment of the 2000*l.* by twenty quarterly instalments of 100*l.* each (the payment of the last of which, if all had been duly paid, would have been more than four years before the end of the mortgage term), and also a covenant to pay the one-third of the profit rental during the whole of the mortgagor's term, although the 2000*l.* and interest had all been paid. The property was redeemable only on payment of 2000*l.* and interest, and all other moneys covenanted to be paid. Some of the instalments being in arrear, W. gave S. three months' notice to pay off all the principal moneys and interest secured by the mortgage. S. paid the instalments in arrear, and within the three months tendered the balance of the 2000*l.*, with interest to the end of the three months and the costs, but W. refused to accept the money:—

Held, (1.) that the stipulations for a share of the profit rental were an illegal clog on the equity of redemption, and (*a*) did not prevent S. from redeeming at the amount of her tender, and (*b*) did not enable W. to recover the share of profit rental; (2.) that W.'s notice requiring payment could not be withdrawn without the consent of S.

THE plaintiff, Miss Kate Santley, being the sub-lessee of the Royalty Theatre, and having, under an agreement dated May 17, 1895, with T. Mowbray, an option, expiring October 24, 1895, to acquire by purchase a lease of the theatre from R. Thompson to Mowbray for a term of 30½ years from December 25, 1874,

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expiring at Midsummer, 1905, at a rent of 485*l.*, on paying 2000*l.*, entered into an agreement dated October 23, 1895, with the defendant S. J. Wilde. By clause 1 the plaintiff was to exercise the option by delivering a notice to Mowbray and paying him 2000*l.* By clause 2 the defendant was to provide this sum. By clause 3 the assignment of the lease to the plaintiff should by her consent be delivered to the defendant on completion of the purchase, and thereupon she was to execute to the defendant a proper legal mortgage (to be prepared by his solicitor) of the lease to secure the repayment of the 2000*l.*, "with all such usual clauses, conditions, and covenants as may be advised by such solicitor to be necessary. Such mortgage shall in particular provide for the repayment of the principal by quarterly instalments of 100*l.* each, the first instalment to be paid on the first day upon which the rent receivable by the said Kate Santley from her tenant shall be payable, and all subsequent instalments by quarterly payments from that date, and for the acceptance of payment by such instalments. The mortgage shall also provide for payment of interest upon the money so advanced or the balance from time to time due at the rate of 6 per cent. per annum payable quarterly upon the same quarter days as aforesaid, and also for payment to the said Samuel Wilde of one-third part of the clear net profit rent received by the said Kate Santley from the undertenants or tenants for the time being (after payment of the said interest and any legal or other expenses) for and during the residue of the term for which the said lease is granted." The 4th and last clause was as follows: "Each party shall also pay all their own legal and other expenses in connection with the purchase of the property and the said mortgage and otherwise in relation to the carrying out of the above agreement. The said Kate Santley shall be entitled to deduct all such costs and expenses borne by her from the said rent for the purpose of ascertaining the before-mentioned clear profit rental."

The reversionary term was assigned by Mowbray to the plaintiff by deed dated December 12, 1895, the 2000*l.* purchase-money being advanced by the defendant.

By a deed dated December 13, 1895, in which the plaintiff

was described as "the mortgagor" and the defendant as "the mortgagee," after reciting that the mortgagee had at the request of the mortgagor lent her 2000*l.* to enable her to purchase the property for the residue of the term of the lease assigned by Mowbray "upon her agreeing that the repayment thereof with interest at the rate" thereinafter "mentioned and the payment of the further moneys as" thereinafter "covenanted by her to be paid to the mortgagee should be secured to him in manner" thereinafter appearing, it was witnessed that in pursuance of the said recited agreement and in consideration of the said 2000*l.*, the mortgagor covenanted to "repay to the mortgagee the said sum of 2000*l.* by twenty equal quarterly payments of 100*l.* each, the first of such payments to be made on the 25th day of December next," and in addition to "pay to the mortgagee interest on the said sum of 2000*l.* or on such portion thereof as" should "from time to time remain due upon this security at the rate of 6 per cent. per annum." The deed then proceeded as follows: "And this indenture also witnesseth that, in further pursuance of the said recited agreement and for the consideration aforesaid, the mortgagor hereby covenants with the mortgagee that she, the mortgagor, will during the residue of the term created by the said indenture of lease, notwithstanding that all principal moneys and interest may have been paid under the covenant hereinbefore contained, pay to the mortgagee a sum equal to one-third part of the clear net profit rent or rents to be derived from all or any leases or lease, tenancy agreements or agreement, which may now or hereafter be subsisting between the mortgagor and any undertenants or undertenant of the said demised premises or any part thereof, such share of net profit rental to become payable from time to time when and as soon as the same shall have been received by the mortgagor, and for the purpose of ascertaining the amount of such net profit rental the mortgagor shall be entitled to deduct from the rents payable to her the interest which shall for the time being be payable and paid to the mortgagee . . . . and also the amount of the rent reserved by the said indenture of lease . . . . and the insurance premiums," and also certain legal and other expenses.

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The deed then contained a demise of the property by the plaintiff to the defendant for the residue of the term acquired from Mowbray "except the last day thereof." Next came the following clauses: "Provided always that if the mortgagor shall pay to the mortgagee the said sum of 2000*l.* and interest, and all other the moneys hereinbefore covenanted by her to be paid at the times, by the instalments, and in the manner hereinbefore provided, together with all other moneys for the time being due upon the security or under or by virtue of these presents then and in such case the said term hereby granted shall absolutely cease and determine and become merged in the reversion immediately expectant thereon. Provided always . . . . that if the said principal sum of 2000*l.* hereby secured shall be paid by the instalments hereinbefore mentioned, or within thirty days next after any of the quarterly days hereinbefore appointed for payment thereof, together with the interest for the time being payable therewith, until the whole of the said principal sum and interest shall be paid, and the mortgagor shall in all other respects perform the covenants on her part herein contained, then the mortgagee shall not nor will require payment of the said principal sum or any part thereof otherwise than by such instalments as aforesaid." Then followed a purchaser's indemnity clause, a covenant by the mortgagor to perform the covenants of the lease from Mowbray, to produce receipts for insurance premiums, and on determination of the subsisting sub-leases to use her best endeavours to relet the property. The rest of the deed was as follows: "And it is hereby further agreed and declared that notwithstanding anything herein contained the power of sale and other powers conferred on mortgagees by statute shall apply and extend to these presents, and be exercisable accordingly by the mortgagee in case of default by the mortgagor in the performance and observance of any of the covenants and agreements on her part herein contained at any time while the term hereby created shall be subsisting, notwithstanding that the said principal sum of 2000*l.* and interest thereon shall have been paid, to the intent that upon the non-performance and non-observance of any of the covenants and provisions herein contained on the

part of the mortgagor, and after the expiration of three months after notice in writing shall have been given by the mortgagee to the mortgagor requiring the performance and observance thereof, and the breaches or non-observance mentioned in any such notice shall then remain unremedied and unobserved, it shall be lawful for the mortgagee to enter into the possession or receipt of the rents and profits of the said demised premises or any part thereof, and to manage the same and to grant or enter into such leases or agreements for leases thereof as mortgagees in possession are by statute authorized to grant or enter into, and to accept surrenders of leases and tenancies upon such terms as may be thought proper, and to make allowances to and arrangements with tenants, and employ such agents or receivers to collect the rents of the said premises, and at such salaries or commission as may be thought fit, and to expend such moneys for insurance, repairs, decorations and otherwise in relation to the said premises as may be necessary to comply with the terms of the lease under which the mortgagor holds the said premises, and any moneys so expended with interest thereon at the rate of 6*l.* per cent. per annum from the time of the expenditure thereof shall be repaid by the mortgagor to the mortgagee on demand, and in the meantime shall be a charge upon the premises. And it is hereby further agreed that all rents and profits to be from time to time received by the mortgagee under the exercise of any mortgagee's powers or other the powers hereby conferred shall be applied so far as the same will extend in the first place in the payment of all costs and expenses incurred by him in receiving or recovering the same or otherwise under this security, and in the next place in discharge of any rents, rates, taxes, expenses of repairs or insurance or outgoings affecting the premises, and in the next place in payment of the interest owing on this security, and the surplus if any of such rents and profits shall be applied in reduction of the instalments of the said sum of 2000*l.*, or any part thereof (if any) which may be then due and unpaid, and after payment of the said instalments or any part thereof then due in reduction of any moneys that may be due to the mortgagee in respect of the one-third net rental profit of

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the premises to which he shall be entitled and which for the time being shall be due and payable, and the residue thereof shall be paid to the mortgagor. Provided always . . . . that the mortgagee in the event of his entering into possession or receipt of the rents and profits of the said premises or any part thereof under any statutory or other power him enabling shall not under any circumstances be liable to account except for such moneys as he shall actually receive, nor for any involuntary losses incurred or occasioned by him or them."

On August 20, 1897, a sum of 350*l.* was owing to the defendant in respect of instalments of principal in arrear, together with an arrear of interest, and on that day the plaintiff served the defendant with the following written notice: "Take notice that I, Samuel John Wilde, of [&c.], do hereby require you to pay off within three calendar months from the receipt by you of this notice the principal moneys and interest owing to me on the security of an indenture of mortgage dated the 13th December, 1895, and made between you of the one part and me of the other part. And further take notice that in default of your so doing I intend to sell the property subject to such mortgage or such portion thereof as I think fit.

"And further take notice that pursuant to the terms of the said mortgage I hereby require you to pay to me the instalments of the said sum of 2000*l.* and the interest thereon now due to me pursuant to your covenants contained in the said indenture of mortgage, and that in case of default by you in paying me the said sums and in performing and observing the said covenants as required by the said mortgage, I intend to enter into possession and receipt of the rents and profits of the above-mentioned premises and to manage the same and to grant and enter into such leases or agreements for leases thereof as mortgagees in possession are by statute entitled to grant or enter into and to accept surrenders of leases and tenancies upon such terms as may be thought proper, and to make allowances or arrangements with tenants and to employ such agents or receivers to collect the rents of the said premises and at such salaries or commission as may be thought fit, and to expend such monies for insurance, repairs, decorations, and

otherwise in relation to the said premises as may be necessary to comply with the terms of the lease under which you hold."

On the same day the plaintiff paid the defendant the 350*l.*, and offered to pay the arrears of interest, but did not then pay them, and on August 23, 1897, the plaintiff appointed a receiver. Then followed a correspondence referred to in his Lordship's judgment, the defendant's solicitors declining to withdraw the notice, and contending that by default in payment of instalments the whole of the 2000*l.* had become due.

On September 20, 1897, they wrote that they were instructed to withdraw the appointment of the receiver and the notice of August 20. In reply plaintiff's solicitors contended that the notice calling in the mortgage remained in force. The defendant's solicitors, however, contended that the mortgage could only be paid off by instalments, and that, moreover, the defendant was entitled to one-third of the net profits during plaintiff's lease.

On November 15, 1897, plaintiff's solicitors wrote to defendant's solicitors giving them notice that on November 20 they proposed to attend to pay the principal and interest up to that date, asking for a statement of the costs, charges, and expenses which the defendant claimed, and inclosing a draft surrender of the mortgage security for approval and return.

On the following day defendant's solicitors replied that the defendant could not be asked to receive the balance of principal and interest except in accordance with the terms of his mortgage, and without prejudice to this they sent the required statement, but refused to approve the draft, which was therewith returned.

Tender of the balance of the 2000*l.*, interest to November 20, and the amount of costs, charges, and expenses, was made on November 20 and refused, and defendant declined to reconvey.

On December 9, 1897, plaintiff commenced the present action, claiming (1.) a declaration that the deed of December 13, 1895, ought to stand as a security only for the 2000*l.*, or so much thereof as still remained owing, with interest up to November 20, 1897, and that so far as the same deed provided for payment to the defendant of a share of the rents and profits,

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or precluded the plaintiff from redeeming on payment of principal and interest, such deed was invalid and not binding on the plaintiff; (2.) redemption and reconveyance; (3.) further relief; (4.) costs.

The defendant counter-claimed for (1.) a declaration that during the residue of the leasehold term, notwithstanding that all the principal and interest had been paid, he was entitled to be paid one-third of the clear net profit rental; (2.) an account of what was due on the footing of that declaration; (3.) payment of the amount found due; (4.) costs.

The action was tried before Byrne J. on January 27 and 28, 1899.

Eve, Q.C., and *A. a'Beckett Terrell*, for the plaintiff. The defendant, having taken steps to enforce his security, must take the principal and interest due without interest in lieu of notice by the mortgagor: *Letts* v. *Hutchins* (1); *Smith* v. *Smith* (2); *Fitzgerald's Trustee* v. *Mellersh.* (3)

[BYRNE J. referred to *In re Alcock.* (4)]

This rule applies even if the time fixed for payment by the proviso for redemption has not expired: *Bovill* v. *Endle.* (5) Here the proviso for redemption continues for the whole of the term which the mortgagor has in the property, and the mortgagee will contend that he is not bound to surrender the whole term till everything has been paid off, including the share of profit rental; but even if he is right, that the deed so provides, *Bovill* v. *Endle* (5) shews that after his notice he cannot refuse the plaintiff's tender.

[BYRNE J. Is a mortgagee's notice to pay off the mortgage irrevocable?]

Yes, except by consent of the mortgagor. The mortgagee has elected to call in the money, and the mortgagor is bound to have the money ready to prevent the mortgagee from exercising his powers. The defendant deliberately refused to withdraw his notice.

(1) (1871) L. R. 13 Eq. 176.
(2) [1891] 3 Ch. 550.
(3) [1892] 1 Ch. 385.
(4) (1883) 23 Ch. D. 372.
(5) [1896] 1 Ch. 648.

But the mortgagee cannot insist on refusing to surrender until the share of profit rental has been paid according to the plaintiff's covenant. The stipulation as to profits is not only a subject of covenant, but is incorporated into the proviso for redemption, and if valid prevents the plaintiff from redeeming on payment of the amount advanced with interest. Such a stipulation and fetter is absolutely void as an improper restriction on redemption or clog on the equity to redeem: *Jennings* v. *Ward* (1); *Broad* v. *Selfe* (2); *James* v. *Kerr* (3); *Field* v. *Hopkins* (4); *Marquess of Northampton* v. *Pollock*. (5) The cases were recently considered in *Biggs* v. *Hoddinott* (6), where Lindley M.R. says: "A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced."

[BYRNE J. What authority is there for saying that the covenant to pay a share of profit rental, as a distinct covenant and apart from its effect on the right to redeem, is bad?]

It must go as part of the security where the principal and interest have been paid off.

Hughes, *Q.C.*, and *R. J. Parker*, for the defendant. The whole of the mortgage deed is valid. It is not contended that the plaintiff was ignorant of the effect of the transaction, or was misled, or was not advised by competent people. The proviso for redemption does extend to the profit rental; but although the plaintiff's term and the mortgagee's sub-term do not expire till 1905, the instalments of the 2000*l.* are to be paid off in five years.

[BYRNE J. Then in terms it is a mortgage without power to redeem.]

The security extends to the share of profit rental, and if to that extent there is an invalid clog on the right to redeem the deed is only bad to that extent. That is shewn by *Broad* v. *Selfe*. (2)

(1) (1705) 2 Vern. 520.
(2) (1863) 11 W. R. 1036.
(3) (1889) 40 Ch. D. 449.
(4) (1890) 44 Ch. D. 524.
(5) (1890) 45 Ch. D. 190, on appeal sub nom. *Salt* v. *Marquess of Northampton*, [1892] A. C. 1.
(6) [1898] 2 Ch. 307, 321.

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In all the other cases the dispute arose on the question of the right to foreclose or the right to redeem.

But the deed is not bad even so far as regards the provisions it contains with reference to the share of profit rental. *Biggs* v. *Hoddinott* (1), explaining *Jennings* v. *Ward* (2), shews that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one, entered into by the parties while on equal terms, without any improper pressure, unfair dealing, or undue influence.

Moreover, a limited clog on the redemption is valid and of every-day practice. For instance, the period for redemption may be postponed for a term of years. It is complained that here there is no power to redeem during the plaintiff's interest in the property. That again is not an unusual state of things: perpetual debentures, irredeemable during the life of a company, are a common occurrence. A mortgage may clearly be made for a term certain, and it has never been held that there is an exception to that rule because the subject-matter of the mortgage consists of leaseholds for short terms, some of which may expire with or before the mortgage term. Where the property is a fee simple, having no fixed time for redemption is repugnant to the idea of a mortgage.

[BYRNE J. You must deal with the case of the whole property being irredeemable.]

Then take the case of a patent, which runs out in fourteen years. The patentee borrows on the security of it 1000*l.* on the terms of that sum being paid back with a share of royalties, the amount of which would depend on the sales. No objection could be taken to such a transaction although the amount payable could not be ascertained till the end of the term.

[BYRNE J. That might not be a mortgage within the meaning of the doctrine, but a joint venture. The form of the transaction may make all the difference. Here redemption is contemplated. Would not the effect be the same if the proviso for redemption were struck out?]

Probably; but it may have been inserted to shew that the

(1) [1898] 2 Ch. 307, 321. (2) 2 Vern. 520.

mortgagor was still to retain an interest. The provision for a share of profit rental is not bad altogether even if it is ineffectual as a clog on the redemption. The objection has never been taken except in proceedings for redemption or foreclosure.

[*Eve, Q.C.* In *Biggs* v. *Hoddinott* (1) the point arose on an application for an injunction. He also referred to *Chapple* v. *Mahon.* (2)]

The transaction was not an ordinary one of loan and mortgage, but a scheme for sharing profits proposed by the plaintiff. If nothing had been said about a mortgage, but it had been agreed that defendant was to have his money back plus interest and plus one-third of the profit rental, that would have been good. A subsequent separate mortgage securing those terms would not be bad in equity. A mortgage may be given to cover an indemnity extending over a number of years.

The notice was withdrawn at the request of the plaintiff. Even if such a notice cannot be withdrawn as regards interest in lieu of notice—to which the cases cited refer—it may be withdrawn, even without the mortgagor's consent, where the mortgagor has not acted on it.

[They also referred to *Newcomb* v. *Bonham* (3); *In re Edwards' Estate* (4); *Chambers* v. *Goldwin.* (5)]

Eve, Q.C., in reply.

Cur. adv. vult.

Feb. 7. BYRNE J. "A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced." The rule is so stated by the Master of the Rolls in the case of *Biggs* v. *Hoddinott* (1) after an expression of opinion that the proposition in *Jennings* v. *Ward* (6) is too wide, but that if properly guarded it is good law and good sense. There is no rule that a mortgagee may not stipulate for a collateral advantage, so that such advantage be fair and

(1) [1898] 2 Ch. 307, 321.
(2) (1870) Ir. R. 5 Eq. 225.
(3) (1681) 1 Vern. 7.
(4) (1861) 11 Ir. Ch. Rep. 367.
(5) (1804) 9 Ves. 254.
(6) 2 Vern. 520.

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reasonable, and so that it does not prevent redemption on payment of principal, interest, and costs. It is lawful to stipulate that the loan shall be repayable by instalments, or that the loan shall remain for a certain time, and so to postpone the time for redemption; and there are other stipulations which may be introduced into a mortgage which will have the effect of regulating the time and manner of redemption. Nevertheless, if it be once established that the transaction is in form and substance one of mortgage or loan on security, and that the mortgage contains a provision which has the effect of preventing redemption of the mortgaged property on repayment of principal, interest, and costs, in accordance with the bargain for repayment of those amounts, such provision is invalid.

I do not think that the view put forward in the present case—namely, that the provision, though unenforceable in a foreclosure or redemption action, may yet be otherwise effectual—can be supported. I think that any such provision cannot enable the mortgagee to maintain any action for specific performance or account, or for damages. It is clearly invalid in equity, and I think that a Court of equity would, before the Judicature Act, have restrained an action at law grounded on a provision invalid in equity, as fettering the equity of redemption, just as in the case of an action grounded on a provision invalid on the ground of its being an unconscientious bargain. I apprehend that now, and probably since the passing of the Common Law Procedure Act, the fact that the provision was invalid upon the ground of fettering the equity of redemption might be effectually pleaded in the action brought upon it. Although a mortgagee may sue on the covenant for payment at the same time as he pursues his other remedies, I do not think that he can maintain an action grounded on a covenant or stipulation invalid upon equitable grounds. The fact that upon redemption, or, indeed, upon valid tender, the mortgagee would be bound to deliver up his securities, and would no longer have the documents upon which to sue at law, seems to me to be inconsistent with the argument put forward.

There are cases in which the transaction, although in form a mortgage, is in substance a transaction of a different kind, as

being, for instance, a settlement or family provision; and that is why I have spoken of the transaction being in substance a mortgage.

In the present case there is no suggestion of oppression or of an unconscionable bargain. The plaintiff grounds her claim for relief upon the existence of certain provisions in a deed which, she says, are invalid as imposing a fetter upon the right to redeem.

The circumstances of the present case, so far as material, are as follows: On October 23, 1895, the plaintiff, being then underlessee of the Royalty Theatre, for a term of years, with an option to purchase the reversionary term then vested in her lessor (such reversionary term expiring in June, 1905), and being desirous of exercising her option, entered into an agreement with the defendant providing for the exercise of the option, 2000*l.* (the purchase-money) being provided by the defendant. The agreement in effect includes a provision for a document similar to that which in fact was afterwards entered into, and, among other things, it provided that, immediately on the lease being assigned to the plaintiff, she should execute to the defendant Wilde a proper legal mortgage (to be prepared by his solicitor) of the lease to be purchased by her, the plaintiff, for repayment of his advance, with all such usual clauses, conditions, and covenants as might be advised by such solicitor to be necessary. Then, without going through the rest of the agreement, there is a provision that the defendant is to receive one-third of the clear net profit rent receivable by the plaintiff from the tenants of the property for and during the residue of the term for which the lease is granted. The reversionary term was acquired by and was assigned to the plaintiff by deed dated December 12, 1895, the purchase-money (2000*l.*) being advanced to her by the defendant for that purpose. On December 13, 1895, the deed upon which the contest arises was executed. It is made between the plaintiff of the one part and the defendant of the other part, and is expressed to be in consideration of the loan and advance by the defendant to the plaintiff of 2000*l.* Then follows a covenant by the plaintiff with the defendant for payment of the 2000*l.* by twenty equal

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quarterly payments of 100*l.* each, the first of such payments to be made on December 25, 1895 (so that the last payment would have to be made on December 25, 1900—that is to say, four and a half years before the expiration of the term), and for payment of interest on the 2000*l.*, or on so much as should from time to time remain due upon that security, at the rate of 6*l.* per cent. per annum. I omit for the present the covenant which immediately follows. Then there is a demise by the plaintiff as beneficial owner to the defendant of the premises comprised in the lease for the unexpired residue of the term, except the last day thereof, subject to the underleases or tenancies affecting the same. Then follows a proviso for redemption upon payment by the plaintiff of the said sum of 2000*l.* and interest (and all other the moneys thereinbefore covenanted by her to be paid) at the times, by the instalments, and in the manner thereinbefore provided, together with all other moneys for the time being due upon the security or under and by virtue of the said mortgage, and it is provided that then and in such case the said term thereby granted should absolutely cease and determine and become merged in the reversion immediately expectant thereon. And it was thereby provided and agreed and declared that if the said principal sum of 2000*l.* thereby secured should be paid by the instalments thereinbefore mentioned or within thirty days next after any of the quarterly days thereinbefore appointed for payment thereof, together with the interest for the time being payable therewith, until the whole of the principal sum and interest should be paid, and the plaintiff should in all other respects duly perform the covenants on her part therein contained, then the defendant should not nor would require payment of the said principal sum or any part thereof otherwise than by such instalments as aforesaid.

From what I have read it is clear that the transaction was in form and substance a mortgage transaction or loan on security, unless the other provisions to which I will now refer have in some way deprived it of that character.

The covenant which I mentioned but omitted to read follows the covenant for payment of principal and interest, and is a

covenant by the plaintiff that she would, during the residue of the term created by the lease assigned to her by Mowbray—that is, during the whole of the term, including the reversionary last day—notwithstanding that all principal moneys and interest might have been paid under the covenant thereinbefore contained, pay to the defendant a sum equal to one-third part of the clear net profit rent or rents to be derived from all or any leases or lease or tenancies to be created. I need not read that with more elaboration. The result is that it was a covenant during the whole of the term of the lease which was granted to the plaintiff that the defendant should be entitled to one-third of the net profits after making certain deductions. Then, after the demise, we come to the proviso for redemption, to which I have already referred, and in terms—inasmuch as redemption is only to take place on payment by the plaintiff of not only the 2000*l.* and interest, but all the other moneys thereinbefore covenanted by her to be paid—that would include the net profits for the whole term; and on such payments being made the term thereby granted is to cease and determine and become merged in the reversion immediately expectant thereon. Now this could not be until the expiration of the whole of the mortgagor's term, and so, in fact, could not happen. Then, when I come to the provision for not requiring payment of the principal sum otherwise than by instalments, and read that with the covenant for payment and the proviso for redemption, I think there must be implied a right to call in the whole sum upon default; and that is in fact, as I understand, the view taken both by the plaintiff and the defendant of the true meaning of the document. Then there is a series of other provisions in effect for continuing the relation of mortgagor and mortgagee, and for continuing the powers of the defendant as a mortgagee after all the principal and interest and costs have been paid off for the purpose of securing to him during the whole of the remainder of the lease granted to the plaintiff the one-third of the net profits after the legitimate deductions under the deed.

The document is not happily expressed in that it does not in terms provide that the whole principal sum shall become due

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in default of payment of the instalments; but, in my judgment, it is a mortgage with certain provisions, in effect making the mortgaged property practically irredeemable, although affecting to contain a redemption clause. I am of opinion that the provisions providing for the payment of one-third of the net profits, extending as they do to a period after the whole of the principal, interest, and costs shall have been discharged, and for continuing the relative positions of mortgagor and mortgagee, and for continuing the mortgage after such discharge for the purpose of securing the one-third of rents and profits, do, in fact, operate to prevent redemption, and that such provisions are consequently void.

I do not think that I can take into consideration the fact that the object of the parties might, perhaps, have been attained in some different way. The parties have elected to effectuate their object by way of loan or mortgage, and I must take the transaction as it stands. I have considered whether or not I might sever the provisions in question, and hold them good during the subsistence of the security for the payment of principal, interest, and costs, and until redemption; but I do not see how I can do this. I should then in effect be reforming the deed including the proviso for redemption, and be making a new bargain for the parties.

There is another point in the case which arises for decision —namely, whether or not the plaintiff is now entitled to redeem on payment of the balance of the unpaid instalments with interest payable up to November 20, 1897, and the amount of the defendant's costs, charges, and expenses to that date, tender having been duly made of those amounts and refused.

On August 20, 1897, a sum of 350*l.* was due to the defendant in respect of instalments in arrear, and on that date the defendant served the notice set out in the statement of claim. Although one document it is in fact two notices. The first of such notices is as follows: [His Lordship read the first part of the notice, ending with the word "fit," and continued:—]

It will be observed that the word "owing" is made use of there as contrasted with the word "due" in the next notice I

am about to read. [His Lordship read the rest of the notice, and continued :—]

I think the defendant was entitled to serve these notices.

On the same August 20, 1897, the plaintiff paid the defendant the 350*l.* arrears of instalments and offered to pay arrears of interest, although she did not, in fact, pay them until a later date. Then followed a further correspondence, which I will not go through in detail, but the result of which appears to be that the plaintiff was at first desirous that the notice to pay off, as well as the notice for the appointment of a receiver and the appointment of a receiver which followed on it, should all be withdrawn; but the defendant declined, and insisted upon what he conceived to be his strict legal rights. Ultimately the parties, having, as I think, taken advice, assumed different attitudes, and the defendant wrote withdrawing his notices. This withdrawal the plaintiff declined to accept, so far as related to the notice to pay off; and I think she was entitled to do so. When the defendant gave notice to pay off the mortgage he created a new position arising by virtue of the original agreement between the parties, and, in my opinion, the position so created could only be altered by the consent, express or implied, of both parties. The case of a notice to quit is in some respects analogous, and in *Blyth* v. *Dennett* (1) Maule J., in distinguishing between the effect of a notice to quit and a forfeiture, points out that in the case of a notice to quit "the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both"; and Jervis C.J. in the same case says: "The old tenancy was put an end to by the notice to quit. To make out a defence to the action, the defendant was bound to shew a new contract." In *Tayleur* v. *Wildin* (2) Kelly C.B. says: "It is clear that, whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both." If the law were otherwise a landlord or tenant might, by withdrawing a notice to quit the day before its expiry, inflict great damage upon the other party in rendering

(1) (1853) 13 C. B. 178, 180. (2) (1868) L. R. 3 Ex. 303, 305.

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all the arrangements made in contemplation of the determination of the holding useless. In like manner a mortgagee might, by withdrawing his notice to pay off at the last moment, inflict serious injury upon a mortgagor who had made all his arrangements upon the footing of paying off the mortgage at the expiration of the notice. In this case I think an effectual tender was made and that the plaintiff is entitled to succeed. I think that the defendant is not entitled to the relief he asks for by his counter-claim, which therefore fails.

Solicitors for plaintiff: *Fladgate & Co.*
Solicitors for defendant: *Page & Scorer.*

F. E.

BYRNE J. 1899 *March* 15, 16, 21.

In re TROTTER. TROTTER *v.* TROTTER.

[1898 T. 874.]

Will—Gift to Attesting Witness—Solicitor—Profit Costs—Codicil—Republication—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 15.

Though a gift by will to an attesting witness is utterly null and void, it may be rendered effectual, if the will is republished by a codicil referring to the will but not attested by the legatee, and (applying the principles of *Gurney* v. *Gurney*, (1855) 3 Drew. 208, and *Re Marcus*, (1887) 57 L. T. 399) this benefit will not be lost to the legatee by his subsequent attestation of a second codicil.

ADJOURNED SUMMONS.

The only question argued upon the hearing of this summons which requires any notice in this report was as to the effect of a duly executed codicil in re-establishing a gift in a will, which would otherwise have failed by reason of s. 15 of the Wills Act, which avoids all gifts to attesting witnesses. The material facts were as follows:—

Charles Vaughan Trotter by his will of February, 1878, appointed one John Trotter, a solicitor, one of his executors and trustees, and directed that his trustee John Trotter, notwithstanding his acceptance of the trusteeship, should be

allowed all professional and other charges for his time and trouble, which, if employed as solicitor to his trustees, not being himself a trustee, he would be entitled to make. John Trotter was one of the attesting witnesses to the will.

In May, 1881, the testator made a codicil to his will, referring to it, and making an additional bequest to a niece in substitution for a bequest in the will. This codicil was not attested by John Trotter.

In November, 1881, the testator made a second codicil to his will, by which he made an alteration in the dispositions of his will, not material for the purposes of this report, and then went on to approve and confirm his will and first codicil in every other detail and respect. This second codicil was attested by John Trotter. It was admitted that, had the will stood alone, John Trotter would not have been entitled to charge for profit costs, as he was one of the attesting witnesses to the will, and the question was, whether the duly attested first codicil re-established the gift in the will, and whether John Trotter had lost the benefit of this by reason of his having subsequently attested the second codicil.

Levett, Q.C., and *H. Fellows*, for the plaintiffs. An authority to charge for costs is in effect a legacy: *In re Barber* (1); *In re White* (2); therefore John Trotter as an attesting witness cannot take the benefit of this gift. The will is the only instrument under which the solicitor can claim to make a charge for profit costs; but as he was an attesting witness the legacy is utterly null and void.

Theobald, Q.C., and *Fischer Williams*, for John Trotter. The duly attested first codicil had the effect of republishing and incorporating the will, so as to enable John Trotter to take advantage of the authority to him to charge for profit costs notwithstanding his attestation of the will: *Anderson* v. *Anderson*. (3) The due execution by the testator of a codicil amounts to a republication, if the codicil refers to such former will, and that, too, without any regard to the fact whether or not

(1) (1886) 34 Ch. D. 77. (2) [1898] 2 Ch. 217.
(3) (1872) L. R. 13 Eq. 381.

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the paper so referred to has been properly executed or not: *Allen* v. *Maddock* (1); Jarman on Wills, 5th ed. p. 72. The fact that John Trotter also attested the second codicil is immaterial; a bequest in a will is not made void because a legatee has attested a codicil which gives him nothing: *Gurney* v. *Gurney* (2); *Re Marcus.* (3) The principle of these decisions applies.

[They also cited *In re Smith* (4) and Sugden's Handy Book, 6th ed. p. 151.]

Levett, Q.C., in reply. The legatee must take the whole testamentary disposition as one instrument, and to that he is an attesting witness. Even assuming the first codicil republished the will so as to enable the legatee to claim, still his attestation of the second codicil again invalidated the gift.

Cur. adv. vult.

March 21. BYRNE J., after stating the facts as above, continued:—Had the matter rested on the will and first codicil alone, it is clear upon the authority of *Anderson* v. *Anderson* (5) that John Trotter would have been entitled to the benefit of profit costs. But the question remains whether or not he is so entitled, having regard to his attestation of the second codicil. The ground of decision in the case of *Anderson* v. *Anderson* (5) was that, as had been held in *Allen* v. *Maddock* (1), the due execution by a testator of a codicil amounts to a republication of a former will, if the codicil refers to such former will, and that without any regard to the fact whether or not the paper referred to complied with the requirements of the law as to execution or attestation of such paper, and the Vice-Chancellor held that it would be as much beyond the provisions and the contemplations of the statute as it would be opposed to good sense and reason to hold that the codicil duly executed and attested had not the effect of republishing the will and making it a new and original disposition by the testatrix, at the date of

(1) (1858) 11 Moo. P. C. 427.
(2) 3 Drew. 208.
(3) 57 L. T. 399.
(4) (1890) 45 Ch. D. 632.
(5) L. R. 13 Eq. 381.

the codicil, of the estate which she had dealt with by the will. In *Gurney* v. *Gurney* (1) the testator had given benefits by his will to two persons who did not attest the will, but who did afterwards attest two codicils. Kindersley V.-C. decided that the word "thereby" in s. 15 of the Wills Act must be construed to mean, by the same testamentary instrument which is attested, and that it does not apply to the case where a legatee has not attested the same instrument under which he takes. This points to the will and codicil being treated as separate instruments for the purpose of ascertaining whether or not an attesting witness to either of such instruments can take. In the case of *Re Marcus* (2) North J., on the authority of *Gurney* v. *Gurney* (1), held that a legatee who had witnessed a will and codicils could not take, but that another who had not witnessed the will by which the benefit was given, but who had witnessed the codicils, could take, and the learned judge applies the same test which was applied in *Gurney* v. *Gurney* (1) in reference to the legatee who witnessed the will and both codicils. He says: "As he cannot point to an instrument under which he claims which he did not witness, I think he cannot take." *Allen* v. *Maddock* (3) shews that an instrument invalid in itself as a will may be incorporated and rendered valid by a subsequent codicil duly and validly attested and referring to the will, the two documents taking effect as one instrument. *Gurney* v. *Gurney* (1) and *Re Marcus* (2) shew that a gift by will not witnessed by a legatee is not rendered invalid as to the gift to such legatee by reason of his attesting a subsequent codicil; and *Anderson* v. *Anderson* (4) decides that, upon the principle laid down in *Allen* v. *Maddock* (3), a gift by will to the husband or wife of an attesting witness (which stands on the same footing as if the gift had been to the attesting witness), though invalid if the will had stood alone, is valid if by a subsequent codicil, not attested by the husband or wife of the legatee, the testator has referred to his will in making his codicil, thereby incorporating and republishing his will with the new codicil. I think that these points in

(1) 3 Drew. 208.
(2) 57 L. T. 399.
(3) 11 Moo. P. C. 427.
(4) L. R. 13 Eq. 381.

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respect of wills made since the Wills Act have been thus established. (1.) That a will invalid in itself may operate as a valid instrument when referred to and incorporated in or with a subsequent and validly-executed codicil. (2.) That a valid gift by will to a legatee is not rendered invalid by reason of his subsequently attesting a codicil, although the codicil has the effect of republishing and incorporating the will. (3.) That, although a gift by a valid will to an attesting witness is utterly null and void, such gift may be rendered effectual if the will is republished by a codicil referring to the will but not attested by the legatee. (4.) That the legatee must be able to point to an instrument giving him his legacy not attested by himself before he can establish his right to his legacy. Bearing in mind these principles, the question appears to be whether or not John Trotter can point to an instrument not attested by himself and giving him the benefit he claims. It cannot be to the will alone, for though a valid instrument it is utterly null and void so far as the disposition in his favour is concerned. But, just as had the original will been altogether void he would have been able to point to a codicil republishing and incorporating the whole of it, and as validating the whole of the dispositions intended to be made by the will, so in like manner I think he can point to the first codicil republishing and incorporating an instrument valid as to some of its dispositions, but invalid as to the dispositions in his favour, as being the instrument under which he claims. I think that the true view is that, where the original gift is by the operation of s. 15 of the Wills Act utterly null and void, the will is pro tanto null and void, as it would have been, if unattested, null and void altogether; and that, just as in the latter case the whole will would, if referred to in a duly-executed and duly-attested codicil, operate in its entirety as from the date of the codicil, so where void in part as to its dispositions by reason of improper attestation, it will, so far as void, operate for the first time by the incorporation and republication effected by the due execution of the codicil. I think that John Trotter is entitled here to point to the first codicil as the instrument conferring upon him the benefit in question, inasmuch as that codicil

incorporates the whole will, including the originally void disposition, and that this being so, upon the authority of *Gurney* v. *Gurney* (1) and *Re Marcus* (2), he has not lost this benefit by reason of his having subsequently attested the second codicil.

Solicitors: *Collyer-Bristow, Russell, Hill & Co.; Tarry, Sherlock & King.*

(1) 3 Drew. 208.

(2) 57 L. T. 399.

W. C. D.

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1899
March 15.

In re GENERAL RAILWAY SYNDICATE.

WHITELEY'S CASE.

[00236 of 1898.]

Company—Winding-up—Contributory—Rescission of Contract to take Shares—Proceedings commenced between Petition and Order for Winding-up.

Notwithstanding the observations of Lord Westbury in *Reese River Silver Mining Co.* v. *Smith*, (1869) L. R. 4 H. L. 64, 77, 78, there is nothing in that case throwing doubt on the decision of Lord Cairns L.C. in *Kent* v. *Freehold Land Co.*, (1868) L. R. 3 Ch. 493, that a shareholder cannot be relieved from liability on his shares on the ground of misrepresentation in an action or proceeding commenced after the presentation of a winding-up petition, but before the order for winding-up on that petition is made.

Where an affidavit, in opposition to an application for final judgment under the Rules of the Supreme Court, 1883, Order XIV., in an action by the company for calls, setting up misrepresentation as a defence, and stating an intention to counter-claim for rescission on that ground, was followed by an order giving leave to defend, and all these matters occurred before the presentation of a winding-up petition, but the counter-claim for rescission was delivered after the petition and before the winding-up order made upon it:—

Held, that the shareholder was too late to apply for relief.

Observations on *In re Scottish Petroleum Co.*, (1883) 23 Ch. D. 413.

THE General Railway Syndicate was incorporated on June 9, 1896, with a capital of 50,000*l.* in 1*l.* shares, and on June 15, 1896, 5000 shares were allotted to W. A. Whiteley.

On December 22, 1897, a call of 5*s.* per share was made, and was payable on January 10, 1898.

On June 27, 1898, the company commenced an action against Whiteley to recover the amount of the call due on his shares, and shortly afterwards served him with a summons for leave to enter final judgment under the Rules of the Supreme Court, 1883, Order XIV.

Whiteley opposed the application, and on July 15, 1898, filed an affidavit stating as his ground of defence that he had been induced to apply for the shares by misrepresentation on the part of the company, and containing the following paragraph: "I intend to counter-claim for a declaration that I am entitled

to the rescission of the contract to take shares in the said company, and to have my name removed from the register of members."

On July 18 the summons was heard before a master in chambers who made an order that final judgment should be entered for the company unless the amount claimed was paid within a week.

On July 20, 1898, the matter came before a judge in chambers, who gave Whiteley unconditional leave to defend.

On July 22 a petition was presented asking that the company might be ordered to be wound up by the Court.

On August 2 Whiteley put in a defence to the action denying that he was a member of the company, and that there was ever any acceptance or allotment of shares or notice of allotment, and stating, alternatively, that if he was a member he was induced to become so by certain misrepresentations in a prospectus issued by the company. At the same time Whiteley delivered a counter-claim by which on the same grounds he claimed—(1.) a declaration that he had never been a member of the company; (2.) alternatively, rescission of any contract he might be found to have entered into to take shares; (3.) rectification of the register of shareholders by the removal of his name therefrom; (4.) an injunction to restrain the company from enforcing the calls.

On August 3 a compulsory winding-up order was made on the petition.

The liquidator settled Whiteley on the list of contributories in respect of the 5000 shares, and Whiteley applied for leave to continue his counter-claim against the company. At the suggestion of the judge, a summons was issued to vary the list by striking off Whiteley's name, with leave to raise the question whether it was too late for Whiteley to set up a case of misrepresentation against the company. This summons was adjourned into Court, and heard by Wright J. on March 15, 1899.

Upjohn, *Q.C.*, and *W. Whately*, for Whiteley. The applicant is entitled, notwithstanding the company has gone into

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liquidation, to raise the question whether he was induced to take the shares by the misrepresentation of the company.

[WRIGHT J. referred to *In re Scottish Petroleum Co.* (1)]

In that case Baggallay L.J., referring to *Oakes* v. *Turquand* (2), *Kent* v. *Freehold Land Co.* (3), and *Reese River Silver Mining Co.* v. *Smith* (4), says: "These cases shew that an equity which would entitle a shareholder to be relieved from shares in a going company will not entitle him to relief if brought forward for the first time after the winding-up has commenced"; and here the applicant filed his affidavit, alleging misrepresentation and his intention to counter-claim, before the petition for winding-up was filed.

[WRIGHT J. The passage cited does not represent exactly the Court of Appeal's decision.]

The shareholder may set up his claim for relief by counter-claim, and it is not necessary in such a case to commence a cross-action before the winding-up, especially when he tells the company by his affidavit what he is going to do. What the applicant did was not mere repudiation: he took a step to give effect to his claim for relief on the ground of misrepresentation.

[WRIGHT J. Order XIV., r. 3, says that "the defendant may shew cause against such application"—for final judgment—"by affidavit," which "shall state whether the defence alleged goes to the whole or to part only . . . . of the plaintiff's claim"—that is, the affidavit is a step in the cause.]

But the counter-claim is a step for relief in proceedings commenced before the winding-up, although when counter-claims were unknown a mere defence to an action for calls was not a proceeding by which a shareholder could obtain the benefit of the rule: *In re Cleveland Iron Co.* (5)

Hon. E. C. Macnaghten, Q.C., and *Peterson*, for the liquidator, were not called upon.

WRIGHT J. It is certainly most important in cases of this kind that the rule laid down should be strictly followed, and if

(1) 23 Ch. D. 413, 433.
(2) (1867) L. R. 2 H. L. 325.
(3) L. R. 3 Ch. 493.
(4) L. R. 4 H. L. 64.
(5) (1867) 16 W. R. 95.

I departed from the settled practice I should open the door to many discussions and perhaps much fraud.

As I understand it, the rule is that the applicant, who seeks to escape from liability on his shares on the ground that he was induced to become a shareholder by misrepresentation, must, where there is a winding-up by the Court, have commenced proceedings to set aside the contract to take shares before the petition was filed, s. 84 of the Companies Act, 1862, providing that in such a liquidation the winding-up shall be deemed to commence at the time of the presentation of the petition. There are exceptions to the rule, as where several actions by different persons have been commenced against the company for rescission on the ground of misrepresentation, and there has been a binding agreement with the company to abide by the result of one of the actions. The other exception is where the company has by fraud induced the shareholder to delay his proceedings.

That is not the case here. In the present case the applicant did commence proceedings by delivering a counter-claim before the winding-up order, but not until after the presentation of the petition. If the observations of Lord Westbury in, and the first paragraph of the head-note of the report of, *Reese River Silver Mining Co.* v. *Smith* (1) were to be taken literally, the commencement of proceedings before the winding-up order was made would be sufficient. But there is nothing in the speeches of the noble and learned Lords who decided that case which throws any doubt on the decision of Lord Cairns L.C. in *Kent* v. *Freehold Land Co.* (2), that a plaintiff cannot be relieved from shares in a company upon the ground of misrepresentation on a bill filed after the presentation of a winding-up petition on which a winding-up order is subsequently made.

Therefore the counter-claim of itself will not avail the applicant. The affidavit filed by him in the action is not by itself such a proceeding as is contemplated by the authorities, and it does not place him in a better position because it states his

(1) L. R. 4 H. L. 64, 77, 78. (2) L. R. 3 Ch. 493.

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intention to counter-claim for rescission. *Hare's Case* (1) shews that where a shareholder has repudiated and threatened to take proceedings for rectification, and then delayed to carry out his threat, this makes his case all the worse.

The application must be dismissed.

Solicitors for applicant: *Ward, Perks & McKay.*
Solicitors for liquidator: *Hays, Schmettau & Dunn.*

(1) (1869) L. R. 4 Ch. 503.

F. E.

SALTON *v.* NEW BEESTON CYCLE COMPANY.

COZENS-HARDY J.

1899

March 16, 23.

[1898 S. 724.]

Company—Director—Qualification Shares—Remuneration—Apportionment—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35).

The articles of association of a company limited by shares provided as follows: "(80.) The qualification of a director shall be the holding of shares of the company of the nominal amount of 250*l*. A first director may act before acquiring his qualification, but shall in any case acquire the same within one month from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly. (81.) The board shall be entitled to receive by way of remuneration in each year 5000*l*. Such remuneration shall be divided among the directors in such proportions and manner as they shall from time to time agree, or, in default of agreement, equally. (92.) The office of a director shall be vacated . . . . (*c*) if he cease to hold the due qualification." N. was one of the first directors, and from June, 1896, to November, 1897 (when the company went into liquidation), he attended eight meetings of the board of directors. He did not acquire any shares within a month of his appointment; but in March, 1897, he acquired twenty-five shares of 10*l*. each, not from the company, but from its promoter. The directors never agreed as to the proportions in which the remuneration was to be divided amongst them:—

Held, that the agreement by N. to serve the company on the terms of the articles as to qualification and otherwise, and the agreement by the company to remunerate him, were cross and not interdependent contracts; that N. could not "cease" to hold a qualification which he never possessed; that as a member of the board he was nevertheless entitled to remuneration; but that he could only claim his share of the remuneration for one year, against which must be set off the 250*l*. due from him to the company for the qualification shares which he had agreed to take.

In this action the plaintiff was J. A. Salton and the defendants were the New Beeston Cycle Company, Limited, and the Hon. Montagu Charles Francis Towneley Bertie, commonly called Lord Norreys, and the plaintiff claimed as mortgagee of moneys alleged to be due from the defendant company to the defendant Lord Norreys in respect of directors' fees and remuneration.

The company was incorporated on June 3, 1896, with a nominal capital of 1,000,000*l*., divided into 100,000 shares of

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10*l.* each. By art. 79 of the articles of association the first directors were to be nominated in writing by the subscribers to the memorandum of association, and Lord Norreys was one of seven persons so nominated. Articles 80 and 81, upon which the questions arising for decision mainly turned, were as follows: "(80.) The qualification of a director shall be the holding of shares of the company of the nominal amount of 250*l.* A first director may act before acquiring his qualification, but shall in any case acquire the same within one month from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly. (81.) The board shall be entitled to receive by way of remuneration in each year 5000*l.* Such remuneration shall be divided among the directors in such proportions and manner as they shall from time to time agree, or, in default of agreement, equally. The company in general meeting may increase the amount of such remuneration, either permanently or for a year or longer term." And by art. 92, "the office of a director shall be vacated . . . . (*c*) if he cease to hold the due qualification."

Lord Norreys did not acquire any shares before the end of the month from his appointment; but in March, 1897, he acquired twenty-five shares, not from the company, but from the promoter, one Lawson, and such a transaction, as his Lordship held, plainly did not satisfy the requirements of art. 80.

The capital subscribed by the public fell far short of the expectations of the promoter, and the total amount subscribed was only 140,000*l.*, a sum which was inadequate for the purposes of the company. The company was accordingly wound up in November, 1897. Between June, 1896, and November, 1897, Lord Norreys attended eight meetings of the board, and, so far as appeared, that was all he did in his character of director. One of the original directors, named Jarratt, retired on November 18, 1896, and the directors (including Lord Norreys) resolved to pay him 100*l.* as remuneration for his services, and this sum was paid by the company. It was sought to be established that on that day Lord Norreys and

the other directors agreed to make no claim for remuneration; but the evidence did not suffice to prove this. Jarratt's vacancy was not filled up, and there were thenceforward only six directors. At a meeting of the board of directors on July 14, 1897, at which Lord Norreys was not present, the other directors resolved not to claim remuneration.

The action was tried before Cozens-Hardy J. on March 16, 1899.

Eve, Q.C., and *T. L. Wilkinson*, for the plaintiff. Lord Norreys certainly became a director, and did not cease to be one by not acquiring his qualification shares within a month of his appointment. The disqualification under art. 92 only applies if the director having acquired his qualification shares ceases to hold them, for a man cannot cease to hold a thing which he has never had. Lord Norreys was no party to the agreement that no directors' remuneration should be taken, and is not bound by any agreement made by the other directors.

R. Younger, for the defendant company. The effect of the articles is that Lord Norreys became disqualified at the end of a month after his appointment, and is not entitled to remuneration, whatever may be the effect of things done by a de facto director. Apart from art. 92, only a director who has duly qualified can claim remuneration fixed by the articles of association: *Eley* v. *Positive Government Security Life Assurance Co.* (1); *Swabey* v. *Port Darwin Gold Mining Co.* (2) From the articles you get the terms on which a director is serving, and one of those terms is that he will acquire the qualification stated in the articles: *Isaacs' Case.* (3) He must comply with his obligations under the articles before he can claim the benefit of them: *Archer's Case.* (4) And having neglected his duty he is not entitled to be paid.

The plaintiff, as assignee of Lord Norreys, cannot be in a better position.

If any remuneration is payable, it is only the amount payable for a complete year. The Apportionment Act, 1870 (33 & 34

(1) (1876) 1 Ex. D. 20, 88.
(2) (1889) 1 Megone, 385.
(3) [1892] 2 Ch. 158.
(4) [1892] 1 Ch. 322.

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Vict. c. 35), has no application to the case. Under the old Apportionment Act (4 & 5 Will. 4, c. 22) it was held that there was no apportionment under a contract between employer and employed where the payment ceased entirely upon the determination of the claimant's right to receive it: *Lowndes* v. *Earl Stamford*. (1) In any case, only one-sixth of 4900*l*. can be claimed by Lord Norreys, for the amount agreed by the board to be paid to Jarratt must be taken into account.

Eve, Q.C., in reply. Lord Selborne L.C. held that "if a director is named in the articles, and never had a qualification, he cannot be said to cease to hold it": *Forbes' Case*. (2) If the director continues to act after the time limited for qualifying there is a continuing offer on his part to take the required shares; the offer remains even after the liquidation has commenced, and the directors may be placed on the list of contributories in respect of the qualification shares: *Isaacs' Case* (3); *Hutchinson's Case*. (4)

But if the director was not qualified, the contracts are severable. He is remunerated for his services, and his title to remuneration is not dependent on his obtaining his qualification.

There is nothing in the articles obliging the board to take 5000*l*., or stating when it is to be paid. The article means that the directors are to be paid at the rate of 5000*l*. a year.

Cur. adv. vult.

March 23. COZENS-HARDY J. (after stating the facts of the case). Lord Norreys having accepted the office of director and acted as such, I must infer an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles, and on the part of the company that he shall receive the remuneration provided by the articles for the directors (see *Isaacs' Case*. (3)) I think these must be regarded as cross contracts and not as interdependent contracts. The resolution of July 14, 1897, in no way bound Lord Norreys or his mortgagee. It remains, therefore, to consider what are the legal rights of

(1) (1852) 18 Q. B. 425.
(2) (1873) L. R. 8 Ch. 768, 775.
(3) [1892] 2 Ch. 158.
(4) [1895] 1 Ch. 226.

Lord Norreys against the company, for the plaintiff cannot stand in a better position than Lord Norreys. It was argued by counsel on the part of the company that Lord Norreys vacated his office of director at the end of the first month, so that no remuneration could be claimed for more than one month. It seems to me, however, that it is an unnatural interpretation of art. 92 to say that Lord Norreys "ceased to hold" the due qualification when, in fact, he never had any qualification. That article contemplates the case of a qualification once possessed and subsequently lost, but not the case of a qualification never possessed.

It was next contended that art. 81, according to its true construction, could only apply to a board of duly qualified directors, and that, therefore, Lord Norreys could not claim any remuneration. If Lord Norreys had been only a de facto director and never a de jure director, I think there might have been force in this contention; but it seems to follow from what I have held on the first point that Lord Norreys, not having ceased to be a director, must be regarded as still a member of the board, and as such entitled to remuneration.

It was further contended that the omission to apply for and obtain shares from the company was such a breach of duty on the part of Lord Norreys that it might be available as a defence to any claim for remuneration. I think, however, that this is not the true view, and that, although the company may have a cross-claim against Lord Norreys for 250*l.*, they cannot deny his title to some remuneretion.

The plaintiff contended that Lord Norreys was entitled to one equal sixth share of remuneration at the rate of 5000*l.* a year from the incorporation of the company to the date of winding-up, after deducting from the total remuneration the 100*l.* paid to Mr. Jarratt, he never having concurred in any other division. Against this it was urged that at the utmost only one year's remuneration could be claimed, and that there is no apportionment in respect of an incomplete year. This seems to me to be right. Art. 81 does not give remuneration at the rate of 5000*l.* a year, but only provides that the board shall be entitled to receive by way of remuneration in each year

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5000*l.* I see no ground for extending this language, or for holding that any remuneration can be claimed except for a complete year. It follows, therefore, that Lord Norreys can only claim against the company one-sixth of 4900*l.*

I was asked by the company's counsel at the bar to allow an amendment of the defence by claiming a set-off in respect of the 250*l.* due from Lord Norreys to the company for the shares which he has been liable to take and pay for since July, 1896. I allow the amendment, and I think the company is entitled to the set-off as against the plaintiff, Lord Norreys' mortgagee. The result is that I must give judgment for the plaintiff for 816*l.* 13*s.* 4*d.*, less 250*l.*—that is to say, for 566*l.* 13*s.* 4*d.*—and the company must pay the costs of the action.

Solicitor for plaintiff: *Robert Greening.*

Solicitors for defendant company: *Sharpe, Parker, Pritchard & Barham, for Hughes & Masser, Coventry.*

F. E.

PEMBERTON *v.* HUGHES.

C. A. 1899 Jan. 24, 26, 27; Feb. 16.

[1897 P. 1701.]

International Law—Conflict of Laws—Foreign Judgment—Divorce—Procedure —Irregularity—English Court, Recognition by.

A judgment or decree pronounced by the Court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign Court had jurisdiction over the subject-matter and over the persons brought before it, and the proceedings do not offend against English views of substantial justice.

Thus, where a decree for divorce had been pronounced by the proper Court in Florida in an undefended action by the husband against the wife on the ground of her violent and ungovernable temper, both the parties being domiciled and resident in Florida, an alleged irregularity in service of process was held not to be a ground for questioning the validity of that decree in an action brought by the wife in the English Courts to enforce a claim arising out of her alleged second marriage to a British subject.

Decision of Kekewich J. reversed.

THIS was an action brought by Mrs. "Sarah Elizabeth Pemberton," who claimed to be the widow of Francis Alexander Richard Pemberton, deceased, asking for a declaration that under a deed-poll executed by him on April 15, 1891, she was entitled to a jointure or rent-charge of 200*l.* per annum issuing out of certain estates in Cambridgeshire devised by the will of one Christopher Pemberton, who died in 1850, to Francis A. R. Pemberton for life with remainder to his first and other sons in tail. On December 20, 1890, the plaintiff went through the ceremony of marriage with F. A. R. Pemberton, then the tenant for life in possession of the devised estates, and the above-mentioned deed-poll was subsequently executed by him in assumed exercise of a power given to him by a second codicil of the testator, whereby, after settling some further estates, the testator empowered every tenant for life who might be in possession of the settled estates under the limitations in his will and second codicil, either in contemplation of or after marriage, by deed "to appoint to or in favour of any woman whom he should marry or have married a yearly

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rent-charge of 200*l.* or not exceeding that sum, to be issuing out of his said estates or any part thereof, and to commence from the decease of such tenant for life," to be payable half-yearly during the life of such woman for her jointure and in bar of dower.

Francis A. R. Pemberton died on August 2, 1892, without issue, whereupon the plaintiff claimed to be entitled to her jointure under the deed-poll. Her claim was however disputed by the defendants, persons who on F. A. R. Pemberton's death became entitled in possession to the settled estates. The dispute arose under the following circumstances.

In February, 1884, the plaintiff and one Holmes Erwin, who were both domiciled and resident in the State of Florida, were married in that country according to the laws thereof. On January 18, 1888, Erwin—he and the plaintiff being then in Florida—obtained from the Florida Court a decree against the plaintiff for divorce on the ground of her violent and ungovernable temper. The plaintiff did not appear to the proceedings, so that they were unopposed.

At the date of the plaintiff's alleged marriage with Francis A. R. Pemberton, which took place in Florida, Erwin was still living, and he had, since the divorce, married again; and what the defendants now contended was that the Florida divorce was invalid, because the rules of the Florida Court required that "ten days" should "intervene" between the day on which process was issued, by writ of subpœna against the defendant, and the day on which it was "returnable"—called "terminal" days—and that in the present case only nine clear days, in fact, intervened between the day on which the writ of subpœna was issued and the day on which it was returnable. The defendants therefore alleged that at the time when the plaintiff went through the form of marriage with Pemberton she was still the wife of Erwin, and that consequently she was not the widow of Pemberton and not entitled to the jointure as such. Hence the present action. On the plaintiff's behalf it was contended that, taking the above rule in connection with another rule, which required "ten days' service" of notice, the "terminal" days might be included for the purpose of effective

process, and that therefore the Florida decree was valid. At the trial of the action before Kekewich J. on July 12, 1898, American lawyers were called on both sides to prove the law and practice of divorce in the Court of Florida, and from their evidence it appeared that the following is the procedure in divorce suits under the law of Florida.

A suit for divorce is commenced by a bill (i.e., a petition) presented to a judge of a circuit Court sitting in Chancery. The statements are verified by a short affidavit by the plaintiff made before a notary of the Court. The bill and affidavit are then filed in the office of the clerk of the Court. A subpœna to appear, addressed to the defendant, is then issued under the seal of the Court. The time for appearance must not be less than ten clear days from the issue of the subpœna. The subpœna is sent to the sheriff for service, and it must be served ten days before the time for appearance. When served, the subpœna is returned and filed in the office of the clerk of the Court which issued it. If the defendant does not appear, a præcipe for a decree pro confesso is obtained by the plaintiff and filed with the clerk of the Court, and after a certain time a decree pro confesso under the seal of the Court is entered by him. This, however, is not the final decree. Before that is obtained evidence in support of the plaintiff's case is taken before the master. He certifies it to the Court, and the evidence and his certificate are then filed in the proper office. Before the case is brought before the Court for final decision a short summary of the proceedings with their dates (called "step notes") is prepared, and is signed by the clerk of the Court and is filed. The papers and proofs are then laid before the judge, and if he is satisfied with them a decree for divorce is pronounced and is drawn up and signed by him and filed. The above procedure was followed by Erwin, and, save in one alleged respect, everything was perfectly regular. His bill was duly presented and filed in the proper Court on November 25, 1887; a writ of subpœna was issued and duly served on the wife (therein called "Catherine Erwin") by the sheriff on the same day. She however never appeared to the bill; and on January 2, 1888, the husband obtained a præcipe for a decree

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pro confesso for her want of appearance, and this præcipe was filed the same day and entered on the next. On January 18, 1888, a final decree was pronounced against the wife in the following form:—

"In the Circuit Court, 5th Judicial Circuit of Florida, Putnam County.

HOLMES ERWIN
vs.
CATHERINE ERWIN } BILL FOR DIVORCE.

" Upon an examination of the papers and proofs in this cause, the Court is satisfied that the allegations of the said Bill have been established, and it is therefore ordered, adjudged and decreed that the bonds of matrimony existing between Holmes Erwin, the complainant herein, and Catherine Erwin, the defendant herein, be and the same are hereby dissolved, because of the habitual indulgence in violent and ungovernable temper on the part of the defendant, Catherine Erwin, towards the complainant, Holmes Erwin."

This decree was duly filed and entered in the Chancery Order Book on January 28, 1888.

The alleged irregularity in the proceedings was, as already intimated, that the subpœna to appear did not leave—as, it was said, was required by the rules of the Court—ten clear days between the date of the writ, November 25, 1887, and the time thereby fixed for the wife's appearance, December 5, 1887, but only nine clear days.

This alleged irregularity was, it was now contended, sufficient to render the whole of the subsequent proceedings null and void, and the decree for divorce, therefore, of no effect whatever.

After considering the expert evidence — which was conflicting as to whether the day of service should be counted as one of the "ten" days—and the rules of the Florida Court, Kekewich J. came to the conclusion that the evidence adduced on behalf of the defendants must prevail, and that "intervening" days meant "clear" days, so that the "terminal" days must be excluded from the computation. He also came to the

conclusion that this defect in procedure went to the root of the jurisdiction of the Florida Court and was fatal to the validity of the divorce. He accordingly held that the plaintiff's case failed, and dismissed the action with costs.

The plaintiff appealed.

The appeal was heard on January 24, 26, 27, 1899.

During the arguments the expert evidence given in the Court below was read at length. Its effect, in addition to what has already been given above, will be found stated in the judgments of the Court of Appeal.

Jelf, Q.C., *Dicey, Q.C.*, and *John Henderson*, for the appellant. In this case there is no question as to the competence of the Florida Court to pronounce a decree of divorce, nor as to its jurisdiction over the parties to the proceedings in which the decree was made. There is no allegation that the lady was in ignorance of the proceedings, or was in any way taken by surprise, or had no opportunity of defending herself therein. On the contrary, the evidence shews that she wanted the divorce, and never intended to appear at all in the proceedings. She has herself never questioned the validity of the decree, but has always upheld it. The decree of the Florida tribunal is now in evidence before this Court. It is a final decree, in due form and correct upon the face of it, and no step has ever been taken by any one to set it aside.

It is said, however, that there was an irregularity or slip in the course of the proceedings leading up to the decree which rendered it absolutely void according to the law of Florida, and obliges the Courts of this country so to regard it. That one alleged slip or irregularity constitutes the whole of the respondents' case.

Now, the evidence does not establish that the decree was void even by the law of Florida; but, however this may be, an English Court cannot go behind the final decree of a foreign Court upon the ground that the foreign Court made a slip in its own procedure. According to the authorities upon international law and the comity of nations, the competence of a foreign Court does not depend upon the exact observance of

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the rules of procedure which the foreign Court has itself framed. That Court is the master of its own process, and must be treated as capable of moulding and applying it to the particular case before it. If the foreign Court has jurisdiction over the parties and subject-matter, its decision cannot be impeached in this country, at all events, by third parties in collateral proceedings, for a mere technical flaw in the process which led up to the decision: *Vanquelin* v. *Bouard* (1); *Buchanan* v. *Rucker* (2); *Reynolds* v. *Fenton* (3); *Ferguson* v. *Mahon* (4); *Schibsby* v. *Westenholz* (5); *Castrique* v. *Imrie* (6); *Godard* v. *Gray* (7); *In re Trufort.* (8)

[VAUGHAN WILLIAMS L.J. referred to *Henderson* v. *Henderson.* (9)]

It is now well established that the Courts of this country will treat the final judgment of a foreign Court as valid, unless (1.) the foreign Court has assumed a territorial competence and jurisdiction which it did not possess; (2.) the judgment was obtained by fraud or collusion; or (3.) the decision is contrary to English views of natural justice. A foreign judgment cannot be impeached merely on its merits, nor upon the ground of a mistake in law: *Castrique* v. *Imrie* (6); *Vanquelin* v. *Bouard* (1); *Green* v. *Green* (10); Foote on Private International Jurisprudence, 2nd ed. p. 547; Westlake on Private International Law, 3rd ed. § 328; Woolsey on International Law, 3rd ed. § 77. We challenge the respondents to produce any authority which shews that this decree for a divorce is invalid.

Warrington, Q.C., and *Ingpen*, for the respondents. We do not dispute that a valid existing judgment by a foreign Court of competent jurisdiction will be treated as valid by the Courts of this country unless it comes within the exceptions which have been mentioned by the appellant's counsel; but we say that there is no such judgment in this case, and that the parties

(1) (1863) 15 C. B. (N.S.) 341.
(2) (1807-8) 1 Camp. 63, 180 b; 9 East, 192.
(3) (1846) 3 C. B. 187.
(4) (1839) 11 Ad. & E. 179.
(5) (1870) L. R. 6 Q. B. 155.
(6) (1870) L. R. 4 H. L. 414, 448.
(7) (1870) L. R. 6 Q. B. 139.
(8) (1887) 36 Ch. D. 600, 617.
(9) (1843) 3 Hare, 100.
(10) [1893] P. 89.

were not divorced in Florida. The Court of Florida pronounced a judgment when it had no properly initiated process before it.

[VAUGHAN WILLIAMS L.J. referred to *Anlaby* v. *Prætorius*. (1)]

The judgment there was good till it was set aside; but in this case the Court had no jurisdiction, and there could be no judgment: Dicey's Conflict of Laws, pp. 402, 403; Story's Conflict of Laws, 8th ed. p. 829.

[RIGBY L.J. *Doglioni* v. *Crispin* (2) seems to be a case like the present. There Sir Cresswell Cresswell said he could not inquire into the validity of a decree of the Portuguese Court; and the House of Lords agreed with him, saying that they must take the decree as they found it, and could not question it in any way. It seems that, if the foreign Court has jurisdiction over the subject-matter and the person, the validity of its decree cannot be questioned.]

In the case cited the Portuguese Court had come to a decision in accordance with its own procedure, and in such a case the decision must be taken as you find it—that is, assuming there has been a proper process. But if there has been no valid process in the foreign court, the decision is not really the decision of a court of justice at all, but merely the decision of persons purporting to act in the execution of their office. In cases where a foreign judgment has been held to be binding here, it was either assumed or proved that the judgment was a valid judgment according to the law of the particular country. The judgment is open to examination as to whether it has been pronounced in accordance with the law of that country.

Now, we contend here that this judgment or decree is not the judgment of a court of competent jurisdiction. The real question is whether this Florida Court was a court at all. We say it had no jurisdiction by reason of the irregularity. It is just as if the party summoned before that Court had never been summoned at all: in that case the matter would come before a person who had no jurisdiction as a judge; and we submit the evidence establishes that the Court had in fact no jurisdiction.

(1) (1888) 20 Q. B. D. 764. (2) (1866) L. R. 1 H. L. 301.

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[VAUGHAN WILLIAMS L.J. It is said in Story on the Conflict of Laws, 8th ed. § 607, p. 829, and by other writers, that it is open to the defendant to impeach the foreign judgment on the ground, amongst others, that "it is irregular and bad by the local law, fori rei judicatæ."]

That passage is referred to by Archibald J. in *Meyer* v. *Ralli* (1); but that was a peculiar case, in which both parties agreed that the judgment was not in accordance with French law.

[RIGBY L.J. Since that passage in Story was written, has there been any decision touching the point?]

Certainly *Castrique* v. *Imrie* (2) does not. The nearest is *Vanquelin* v. *Bouard*. (3)

[LINDLEY M.R. That the judgment of a foreign Court may be impeached on the ground of want of jurisdiction is also stated in Smith's Leading Cases, 10th ed. vol. ii. p. 770.

RIGBY L.J. Suppose the judge made a mistake: what then?]

We agree, a mistake would not be enough to invalidate the jurisdiction. The only jurisdiction given to the foreign Court is a jurisdiction given by statutory enactment: if the Court does not conform to that enactment it has no jurisdiction. The defendants here are not bound by estoppel of record. Taking the analogy of proceedings in the English Courts, irregularity in process makes the whole subsequent proceedings void, so that they may be disregarded: *Hawthorn* v. *Harris* (4); *Phillipson & Son* v. *Emanuel* (5); Maddock's Chancery Practice, 3rd ed. vol. ii. pp. 242–3, 391. In the present case the Florida Court had no jurisdiction to make a decree of divorce ex parte: the Florida statutes require divorce proceedings to be inter partes. Any omission to comply with the rules of procedure go to the very root of the jurisdiction, and therefore this case must be treated as if there had been no judgment at all.

Jelf, Q.C., in reply. A final judgment of a foreign Court having jurisdiction over the parties and the subject-matter of

(1) (1876) 1 C. P. D. 358, 370.
(2) L. R. 4 H. L. 414.
(3) 15 C. B. (N.S.) 341; 33 L. J. (C.P.) 78.
(4) (1875) 23 W. R. 214.
(5) (1887) 56 L. T. 858.

the suit is conclusive: Bullen & Leake's Precedents of Pleadings, 5th ed. p. 748. It is therefore too late now to question this decree.

Cur. adv. vult.

Feb. 16. LINDLEY M.R., after stating the facts, and pointing out that the decree for divorce had been made by a Court having jurisdiction in Florida to pronounce divorces between persons domiciled and resident in Florida, and had never been set aside or reversed, and now stood as a final and subsisting decree, proceeded:—

There are no grounds whatever for saying that the plaintiff did not know of the proceedings, nor that she had not time to enter an appearance on or before December 5, the time fixed for her appearance; nor that she had no opportunity of defending herself. Moreover, she is not herself questioning the validity of the decree of divorce; on the contrary, she maintains it was and is perfectly valid. The defendants, however, contend, and they have adduced expert evidence to prove, that as the subpœna to appear did not give the wife ten clear days for appearance the subpœna was not irregular only, but absolutely void, so that all subsequent proceedings were void also, and that the Court had no jurisdiction to pronounce any decree against the wife. The defendants further contend that, the decree being wholly void by the law of Florida, it must be treated as wholly void by this and all other civilised countries. The evidence of the law of Florida is not to my mind so clear as to convince me that the decree, standing as it does unimpeached, could be treated in a collateral proceeding as wholly null and void even in Florida. Mr. Struntz, the plaintiff's expert, does not take that view of the law. It is true that in two passages of his cross-examination he says that if proper proceedings were not taken the Court would not have jurisdiction, but he insists that as the wife was served in time the defect in the subpœna was not fatal to the jurisdiction of the Court. The defendants' expert, Mr. Wurtz, unquestionably goes much further, and says that Mrs. Pemberton and Mr. Erwin, who also married after the divorce, could be both

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convicted in Florida of bigamy, notwithstanding the decree. But even Mr. Wurtz says that the defect in the writ of subpœna would have been cured by the wife's appearance, which makes me hesitate in saying I am satisfied that the decree is void, even by the law of Florida, for want of jurisdiction. The Court which pronounced the decree ought to be credited with knowing what irregularities (if any) were fatal to its jurisdiction and what were not, and the Court had before it all the materials necessary for forming a judgment, and oversight or carelessness ought not to be presumed by us. Although, therefore, Kekewich J. considered Mr. Wurtz a more satisfactory witness than Mr. Struntz, I could not myself, without further information, come to the same conclusion as the learned judge as to the utter worthlessness, even in Florida, of the decree which the defendants impeach. Further information on this point could be procured, if necessary, under the provisions of 24 & 25 Vict. c. 11, but, in my opinion, it is not necessary to pursue this question further.

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign Court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never

inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained—i.e., over the subject-matter or over the persons brought before them: *Schibsby* v. *Westenholz* (1); *Rousillon* v. *Rousillon* (2); *Price* v. *Dewhurst* (3); *Buchanan* v. *Rucker* (4); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (5) But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense—i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country. This is pointed out by Mr. Westlake (International Law, 3rd ed. § 328) and by Foote (Private International Jurisprudence, 2nd ed. p. 547), and is illustrated by *Vanquelin* v. *Bouard*. (6) That was an action on a judgment obtained in France on a bill of exchange. The Court was competent to try such actions, and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French Court had no jurisdiction, because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court (see the 13th plea). The Court of Common Pleas held the plea bad, and that the defence set up by it should have been raised in the French action. The French action in *Vanquelin* v. *Bouard* (6) was an action in personam, and the parties to the action in France were also the parties to the action brought in this country on the French judgment. The decision, therefore, does not exactly cover the present case, but it goes far to shew that the defendants' contention in this case cannot be supported.

(1) L. R. 6 Q. B. 155.
(2) (1880) 14 Ch. D. 351.
(3) (1838) 4 My. & Cr. 76.
(4) 9 East, 192.
(5) [1894] A. C. 670.
(6) 15 C. B. (N.S.) 341.

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The defendants' contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view. But that distinction rests on good sense, and is recognised by modern writers on private international law: see Westlake and Foote (ubi sup.) and Piggott on Foreign Judgments, 2nd ed. p. 129 et seq. He says (p. 130): "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit."

Wharton's Conflict of Laws, § 792 et seq., contains a careful review of the question by a learned American lawyer, and brings out the distinction very clearly: see §§ 801, 812. In § 812 he says: "The true test seems to be, competency according to the rules of international law": and it is plain that these do not include mere rules of procedure.

In Dicey's Conflict of Laws there are some valuable chapters —xi. p. 361, and xvi. p. 400—on the jurisdiction of foreign courts; and in them will be found various meanings of the expression, "court of competent jurisdiction." These various meanings shew the danger of using that expression without taking care to avoid the confusion to which they otherwise give rise.

It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a Court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign Court of competent jurisdiction in the sense above explained is a matter which the Courts of this country are bound to recognise if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to shew that it cannot be accepted.

A judgment of a foreign Court having jurisdiction over the parties and subject-matter—i.e., having jurisdiction to summon the defendants before it and to decide such matters as it has decided—cannot be impeached in this country on its merits:

Castrique v. *Imrie* (1) (in rem); *Godard* v. *Gray* (2) (in personam); *Messina* v. *Petrococchino* (3) (in personam). It is quite inconsistent with those cases, and also with *Vanquelin* v. *Bouard* (4), to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique* v. *Imrie* (1) Lord Colonsay said (5) that no inquiry on such a matter should be made.

A decree for divorce, altering as it does the status of the parties and affecting, as it may do, the legitimacy of their afterborn children, is much more like a judgment in rem than a judgment in personam: see *Niboyet* v. *Niboyet*. (6) And where there are differences between the two, the decisions on foreign judgments in rem are better guides for the determination of this case than decisions on foreign judgments in personam. The leading cases on foreign judgments in rem are *Doglioni* v. *Crispin* (7); *Castrique* v. *Imrie* (1); *In re Trufort*. (8) There is nothing, however, in the decisions in these cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention.

In *Doglioni* v. *Crispin* (7) a Portuguese Court decided that the respondent was the natural son of a deceased man domiciled in Portugal, and not a "noble," and that the respondent was consequently entitled to succeed to his father's personal estate. The appellant was a party to those proceedings, but she afterwards claimed the property in question under a will of the deceased. She was held precluded from disputing the Portuguese decree. Lord Cranworth distinctly stated (9) that the decision, having been pronounced by a court of competent jurisdiction, was one which English Courts were "bound to receive without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced"; and a little lower Lord Cranworth stated that, in his opinion, evidence to shew that the decision was not in accordance with Portuguese law ought not to have been received. Lord

(1) L. R. 4 H. L. 414.
(2) L. R. 6 Q. B. 139.
(3) (1872) L. R. 4 P. C. 144.
(4) 15 C. B. (N.S.) 341.
(5) L. R. 4 H. L. 448.
(6) (1878) 4 P. D. 1, 12.
(7) L. R. 1 H. L. 301.
(8) 36 Ch. D. 600.
(9) L. R. 1 H. L. 315.

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Cranworth's judgment did not, as I understand it, turn on the fact that the appellant was personally estopped from disputing the Portuguese judgment because she was a party to the proceedings in Portugal: his decision was based on the competence of the Court and the nature of the controversy before it. It is necessary, however, to bear in mind that undefended proceedings for divorce require to be very narrowly scrutinized, for such divorces may be easily connived at. It is unnecessary to consider whether an English Court would recognise a foreign divorce proved to have been obtained by collusion, even if the parties divorced were foreigners domiciled and resident within the jurisdiction of the foreign Court. No collusion is relied upon or proved in the present case. If, therefore, the principles above explained are correct, I see no ground on which an English Court can refuse to recognise the validity of the divorce in question in this case, unless it be on one or other of the two following grounds—namely, (1.) that a foreign divorce decree pronounced in an undefended action will never be recognised in this country; or (2.) that the Courts of this country will not recognise any divorce even of foreigners for any causes other than those for which a divorce can be obtained in this country. To lay down now for the first time either of these doctrines is, in my judgment, quite impossible, nor were they alluded to by counsel. I thought it, however, desirable to mention them, in order that it might not be supposed that they had been overlooked.

In the result the appeal must be allowed and the judgment reversed, and a declaration be made that the plaintiff is entitled to the 200*l.* a year, with an account and order for payment. The defendants must pay the costs of the action and of the appeal.

RIGBY L.J. I entirely agree, and I base my judgment on the ground that we have no right in this action to inquire into the question whether or not the Court of Florida did or did not act upon a correct view of the law and procedure of its own State.

The State had exclusive jurisdiction to deal with divorces of

persons domiciled and resident within its territory, and (if that be material) the Court which pronounced the decree for a divorce was the proper court, and the only proper court, for entertaining and deciding upon divorce actions within the territory. It seems to me that, on principle and authority, the Courts of this country are bound to assume that the Florida Court understood its own procedure and law, and that the evidence of experts ought not to have been resorted to. I think that *Castrique* v. *Imrie* (1) (a case of a judgment in rem) and *Vanquelin* v. *Bouard* (2) are two of the most important authorities on the point. I think that the result of all the cases is that a decision of a proper Court having, in accordance with general principles of law recognised by our Courts, sole jurisdiction over the subject-matter of the action and the parties thereto must, by the Courts of this country, be treated as the only competent tribunal to deal with the question raised in the divorce action. Even though it were possible to point out some mistake as to the municipal procedure or law, the Courts of this country ought not, on that ground, to override the actual decision. The objection taken is that the Court of Florida had, according to the municipal law, no jurisdiction to pronounce a decree; but such an objection as that, I think, ought not to be entertained by us. Mrs. Erwin had all the notice of the proceedings which the law of the State required, though if we had a right to inquire further it might well be that there was an irregularity in fixing the day for appearance. The effect of a judgment such as this, determining the status of Mrs. Erwin to be that of a feme sole, has as much effect as against persons not parties to the action as a judgment in rem in analogous circumstances would have had.

VAUGHAN WILLIAMS L.J. I agree with the rest of the Court that the divorce decree in the Court in Florida must be treated as the judgment of a foreign court of competent jurisdiction, and cannot be examined or impeached on any of the grounds suggested. That the Florida Court is, from an international point of view, a court of competent jurisdiction is not

(1) L. R. 4 H. L. 414. (2) 15 C. B. (N.S.) 341.

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questioned. The parties were married in Florida and domiciled there and present within the jurisdiction.

It is said that the evidence of the foreign experts shews that the judgment is a nullity by reason of the defective process, and that we are bound by their evidence as to what the foreign law is; but this evidence does not shew, in regard to judgments generally, that if, in civil proceedings in Florida, the judgment had been relied on, the party against whose interest it was set up would not have had to shew that the judgment had been set aside. It is clear, in the case of a judgment of a superior court on a personal action in England, that if a plaintiff, arrested on a process, sued in trespass and the defendant justified under process under a judgment of a superior court, the plaintiff, if he impeached this judgment, even on a ground that the action was wrong in its inception, would have had to allege and prove that the judgment had been set aside, or that error had been successfully brought.

There is no evidence that this law is not the same in Florida, and I think that we ought, in favour of the foreign judgment, to make this presumption, that is to say, to treat it in a civil proceeding as we should treat the judgment of a superior court.

The present case is analogous to the case where, in a foreign country, the proceedings have been taken against a person subject to the jurisdiction, but not in the proper court. In *Vanquelin* v. *Bouard* (1) and *Doglioni* v. *Crispin* (2) the defendant was properly served and had the opportunity in the suit of pleading to the jurisdiction of the Court, which was not the proper court.

Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the Court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment

(1) 15 C. B. (N.S.) 341. (2) L. R. 1 H. L. 301.

as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not in such a case avail the defendant: *Buchanan* v. *Rucker* (1); *Ferguson* v. *Mahon* (2); Bullen & Leake's Precedents of Pleadings, 5th ed. p. 748.

Solicitors: *Frere, Cholmeley & Co.; Hopgoods & Dowson.*

G. I. F. C.

PERRINS *v.* BELLAMY.

[1897 P. 987.]

Trustee—Breach of Trust—Relief of Trustees from Personal Liability—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

Trustees of a settlement, erroneously assuming that they had a power of sale, sold the leaseholds comprised in the settlement, and thereby diminished the income of the plaintiff, who, as tenant for life of a moiety, was entitled to the rents and profits in specie, though the sale would have been a proper one had the trustees in fact possessed a power of sale.

An action having been brought by the plaintiff against the trustees to make them liable for the diminution of income:—

Held, by the Court of Appeal, affirming the judgment of Kekewich J., [1898] 2 Ch. 521, that as, on the evidence, the trustees had acted honestly and reasonably, they were entitled under s. 3 of the Judicial Trustees Act, 1896, to be relieved from personal liability in respect of the breach of trust, and the action was accordingly dismissed with costs.

THIS was an appeal by the plaintiffs from the judgment of Kekewich J. (3)

Further facts in the case sufficiently appear in the judgments of the Court of Appeal.

Bramwell Davis, Q.C., and *G. E. Tyrrell*, for the plaintiffs, the appellants, repeated the arguments urged by them in the Court below, contending that the onus lay on the trustees to justify their conduct as having acted not only "honestly," but

(1) 9 East, 192.

(2) 11 Ad. & E. 179.

(3) [1898] 2 Ch. 521. This former report requires two corrections: On p. 524, line 14, "1838" should be substituted for "1853"; and on p. 525 there should be added to line 11, "and that they had an express power of sale under the deed of October 6, 1882."

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also "reasonably," within s. 3 of the Judicial Trustees Act, 1896, and that they had not acted "reasonably" in the circumstances.

[LINDLEY M.R. My old master, the late Lord Justice Selwyn, used to say, "The main duty of a trustee is to commit *judicious* breaches of trust"]

[*In re Grindey* (1) was also mentioned.]

Warrington, Q.C., and *S. B. L. Druce*, for the defendants the trustees, and

Bardswell, for the defendant Eliza Barnett, a beneficiary supporting the trustees, were not called upon.

LINDLEY M.R. I do not think there is any ground whatever for differing from the view taken by the learned judge in the Court below of the application to this case of that extremely beneficial enactment which is contained in s. 3 of the Judicial Trustees Act, 1896. That there has been a breach of trust in this case is obvious; but what does it come to after all? We have a voluntary settlement of some leaseholds, which are assigned by the settlor to trustees upon trust for his wife for life, and then to his two daughters for their respective lives in equal shares, and then for their children in the manner stated in the settlement. I do not go into the details of that settlement, because nothing turns upon them. It contains, however, no clause authorizing the settlor to revoke or vary the trusts, nor is there any clause, when the settlement is carefully considered, either in the direction for investment or elsewhere, authorizing the trustees to sell the leaseholds. It seems that the settlor, finding that the settlement contained no power of sale, in October, 1882, executed another deed expressly purporting to give the trustees a power of sale. That, however, he clearly had no power to do.

Now, there was no breach of trust or any irregularity so long as the settlor lived, nor so long as his wife lived. She died in February, 1895, whereupon some estate duty, to the amount of 600*l.*, had to be raised; and the question was how best to raise it. That took the trustees to their solicitors naturally

(1) [1898] 2 Ch. 593.

enough, and then discussion took place, not only about raising the 600*l.*, but also about the trust property generally; and the trustees were advised that there was a power to sell. That was a mistake, I agree; it was a mistake made by the solicitors, who appear to have put a wrong construction upon the original settlement and upon the legal effect of the document of 1882. However, they thought that there was power to sell, and they told their clients so. That was with reference more particularly to the 600*l.* That started the matter: it was the necessity for raising the 600*l.* that led the trustees to seek advice at all. They are told that they had better obtain a report from a competent surveyor, and they do so. He reports that the leasehold houses constitute a very undesirable property for trustees to retain. Thereupon the solicitors, under the impression that there is power to sell, advise a sale, and the property is sold. It ultimately turns out that two of the purchasers take alarm, and refuse to complete their purchase; and upon a vendor and purchaser summons it is held, and I have no doubt rightly, that the trustees have no power to sell. Of course those purchasers could not be compelled to take the property. On the other hand, a great many of the purchasers either were content to take the risk, or did not trouble themselves about the matter, or thought there was power to sell. There was some little difficulty about the matter, because certainly there was power to sell enough property to raise 600*l.* There is no question at all about that under the Settled Land Act; and which particular houses would be hit by the blot might have given rise to some little trouble. However, the objection was taken by two of the purchasers, and the rest did not take it.

Now it becomes important to bear in mind that the present plaintiff, Mrs. Perrins, one of the two daughters interested under the settlement, was aware of the advertisement for sale, which was published on March 17, 1895. She objected to a sale; whereupon Mr. Bellamy, one of the trustees, wrote to her on April 2 stating that the trustees, having given the subject their best consideration, had come to the conclusion that it was best for all parties interested under the settlement that the

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sale should proceed. The sale took place on May 10, and if she had wished to prevent the sale it was quite open to her to have commenced an action against the trustees to stop it, but she did nothing of the sort. The sale takes place, and no writ is issued until May 11, 1897, when she issues the writ in this action against the trustees asking that they may be made liable for the loss of income which she has sustained by reason of the sale of these houses. Before 1896 she would have succeeded in making these unfortunate trustees liable for that loss under the decisions then applicable to trustees—a very hard state of the law, and one which shocked one's sense of humanity and of fairness. That state of the law was brought to the attention of Parliament in 1896, and Parliament, by the Judicial Trustees Act of that year, relaxed it deliberately and enacted, by s. 3, sub-s. 1, of that Act, that, "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust"—the sub-section says "is liable," thus assuming that a breach of trust has been committed—"whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act"—making this extremely beneficial enactment retrospective—"but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." That is to say, the Act throws upon the Court the extremely difficult and responsible task of saying, "You, a trustee, have committed a breach of trust, but at the same time, under the circumstances and having regard to your having acted honestly, reasonably, and fairly, you shall be excused: we are of opinion it is not a case in which you ought to be held liable to make good the loss."

Now we have to consider what happened here. That there was honesty is plain enough; that there was reasonableness is, to my mind, absolutely plain when we consider the facts to which I have alluded. As to not applying to the Court for advice, I apprehend that the words were put into the section in

order to give the trustees an answer to the argument which is sure to be urged, "Oh, you ought to have applied to the Court." Here it is said that the trustees ought to have applied to the Court, at all events when the purchasers raised their objection, if not before. Suppose they had, what could the Court have done? They had got into a mess, and what could the Court have done to get them out of it? I do not see what they could have gained by coming to the Court at all, and I do not think there was anything unreasonable in completing the purchases with those who were willing to complete. Of course they had to submit to the consequences of having entered into invalid contracts for sale with respect to those persons who took the objection and persisted in it. I cannot conceive a case to which this Act is applicable if this is not one. There is honesty, there is reasonableness and everything else in favour of the trustees except that, unfortunately, they committed the breach of trust. It was not to their personal advantage. I have not the slightest doubt that it was a most judicious breach of trust—that is to say, looking at the interests of the reversioners as well as to the interest of the tenant for life; and there is not one trustee in a thousand, or one business man in a thousand, who would not have done likewise.

This is precisely one of those cases in which we are enabled, and in which, being enabled, we ought to say, that the trustees are entitled to this protection. The appeal will be dismissed with costs.

RIGBY L.J. I am of the same opinion. I remember well in my early days cases in which, there having been inadvertent breaches of trust involving no moral blame, the consequences were visited upon the trustees. It was said, "The Court of Chancery was open to you, and if you chose to incur the risk of going on without asking the direction of the Court, you must take the consequences." That was the only excuse that I can remember for the extremely hard orders against trustees, and it shocked one's conscience. Now all that has been altered. A trustee is not now entitled, as of course, to get the direction of the Court. He cannot get rid of his responsibility. He

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cannot, except at the risk of having to pay the costs of the proceedings, approach the Court at all. That is such a change that no possible excuse has been left for those old decisions which operated so hardly in many cases upon trustees. That state of things has been remedied to a great extent, or, to put it in another way, the Court is entitled to remedy it in a proper case. I need not go into the cases in which trustees can obtain the protection of this Act; but, dealing with such a case as that before us, the question is no longer a question of breach of trust; if the trustees had not committed a breach of trust they could not be made liable. The question is, what is to happen when they have in fact committed a breach of trust? Here the trustees have committed a breach of trust undoubtedly, when you come to look carefully into the documents under which they were acting; and, amongst other things against which they are to be protected, is, according to the words of the section, the omission to obtain the directions of the Court. The question we have to determine is, Have they behaved honestly in the matter of the sale? Undoubtedly they have: no one pretends to say the contrary. When they go to their solicitors about raising 600*l.* for estate duty we have it in evidence that the solicitors consider the question whether they had power to sell or not, and the solicitors arrive at a conclusion upon it. Whether the solicitors said in so many words, "We advise you that you have power to sell," or whether they allowed the trustees to proceed on the assumption that they had power to sell, to my mind makes no difference at all. The deed of October, 1882, was of a nature to impress a person who did not very carefully consider it with the idea that there was power to sell. The deed purported to give that power in so many words expressly and clearly; and I presume that whoever drew that deed thought that power a matter of importance, as the solicitors employed by the trustees in this case manifestly did. The solicitors took that deed into consideration and came to the conclusion that the trustees had power. Then what did the trustees do? As regards the propriety of selling the houses held for the shorter terms, no doubt appears to have entered the minds of either of them, and, when they went on to discuss

the question of selling the other houses, their solicitors told them they must get the opinion of a competent surveyor on that subject. The surveyor then made his report, which shewed them, I think, very conclusively that if they had power —as they were assuming they had—they ought to sell. Thereupon they sold. Of course they were wrong; but did they act honestly? I say "Yes." Did they act reasonably? I say "Yes" to that. Ought they to be fairly excused? I say "Yes" to that also. If, then, we come to the conclusion that they are within the Act, I think we are bound, in the exercise of the discretion vested in us, to give them the relief which the Act provides.

ROMER L.J. I agree, and I cannot usefully add anything to what has been said.

Solicitors: *H. Tyrrell & Son, for J. B. Clarke & Co., Birmingham; Gamlen, Burdett & Gamlen, for Cottrell & Son, Birmingham.*

G. I. F. C.

CASTNER KELLNER ALKALI COMPANY *v.* COMMERCIAL DEVELOPMENT CORPORATION.

[1897 C. 4000.]

Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 6—*Practice—Particulars of Objections—Costs—Shorthand Notes.*

Particulars of an objection to a patent for want of novelty delivered by a defendant enumerated specifications of prior patents. The plaintiffs' patent was held novel, but bad for disconformity. The Court certified that the particulars of such of the specifications as had been of assistance in deciding the question of nonconformity were "reasonable and proper, without regard to the general costs of the case."

The cost of transcripts of shorthand notes of evidence for the purpose of appeal allowed.

THE plaintiffs claimed an injunction to restrain the defendants from infringing letters patent granted to Carl Kellner in 1894, numbered 20,259. The defendants set up the usual defences in a patent action, including want of novelty, want of

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conformity, and want of subject-matter, and delivered particulars of objection numbered from 1 to 8. The particular numbered 2 alleged that Kellner's invention was not new at the date of his patent, "but was published within the realm before the date thereof in the manner following:" eight specifications were then designated.

The action was tried before Bigham J., sitting as a judge of the Chancery Division. He found all issues in favour of the plaintiffs, and gave judgment for an injunction with costs. The defendants appealed. The question of novelty was not contested by the defendants either at the trial or on appeal; but all the specifications mentioned in the defendants' 2nd particulars of objection, except one taken out by Camille Petri in 1866, were used in evidence and argument as throwing light on the state of things at the date of Kellner's patent, and the construction of the language of his specifications. The Court of Appeal reversed the decision of the Court below with costs. The Master of the Rolls held that Kellner's patent was void because the complete specification did not conform with the provisional specification. Refraining from deciding whether there was a proper subject of invention, Rigby L.J. held that the Kellner patent was void for disconformity, and also that it was bad for want of subject-matter. Vaughan Williams L.J. differed, being of opinion that the judgment of the Court below ought to be upheld.

Thomas Terrell, Q.C. (*Astbury*, Q.C., *MacConkey*, and *Gray* with him), for the defendants. I ask your Lordship, notwithstanding that the defence of want of novelty is not sustained, to certify that the particulars of objection, so far as they enumerate the seven specifications, not including Petri's, are proper and reasonable without having regard to the general costs of the case. Unless such certificate is made, the taxing master cannot allow the costs relating to putting those specifications in evidence. That evidence has been useful to the Court in coming to the conclusion it has; the practice has sprung up of certifying the reasonableness of such particulars where useful, though they are not used for the apparent purpose they

are particularised for. It is found in practice necessary in order to get such matter in evidence to state it in the particulars. He also asked for the costs of transcripts of shorthand notes of evidence which had been provided by the defendants and used for the purpose of the appeal.

Lord Robert Cecil (*Moulton, Q.C., Bousfield, Q.C., J. C. Graham*, and *A. J. Walter* with him), for the plaintiffs, contra.

LINDLEY M.R. The consideration of a point like this does not so frequently occur in the Court of Appeal as at a trial; we are not so familiar with the practice as the judges who try patent cases; we should like to consider the matter for a short time in order to look at the authorities and to consult those more familiar with the practice. Perhaps counsel will furnish a list of the authorities.

A list of cases was settled by counsel on each side and given to their Lordships.

April 22. The judgment of the Court (Lindley M.R., Rigby and Vaughan Williams L.JJ.) was delivered by

LINDLEY M.R. The appeal in this case having been allowed with costs, we have to consider whether costs of the shorthand writer's transcript of the evidence shall be allowed, and what certificate we ought to give under s. 29, sub-s. 6, of the Patents Act, 1883, relating to particulars of objections.

As regards the shorthand transcript of the evidence, it was taken and referred to day by day in the Court below, and three copies of it were really necessary to enable the Court to follow the arguments. The costs incurred by the appellants in obtaining not only those copies, but also such other copies as were reasonably required for the purposes of their appeal, ought therefore to be allowed them.

As regards the particulars of objections, the defendants raised eight objections to the plaintiffs' patent, and the second, which was want of novelty, was followed by a list of patents said to be anticipations. They were not anticipations, and the second

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objection was not proved. But a knowledge of the patents enumerated in the list, with one exception (Petri's), was really necessary to enable the Court to understand the subject-matter to which the patent related, and the state of knowledge which persons conversant with that subject had at the date of the patent. We felt a difficulty, however, in adopting the ordinary form of order, owing to the objection for want of novelty. The particulars to which the Act refers are not confined to the objections, but include whatever is stated will be relied upon by the party delivering them. The specifications enumerated under the second objection are particulars within the meaning of the section quite as much as the objection itself, and they (with the exception of Petri's) were all reasonably and properly mentioned in the defendants' particulars of objections. We cannot properly decline to certify in the usual form that the costs of the defendants' particulars ought to be allowed, except as regards Petri's specification mentioned in No. 2.

Having regard to the language of s. 29 and to our own limited experience in granting certificates under it, we have thought it right to consult our colleagues and one of the most experienced of the taxing masters as to the practice in these cases. We are informed that certificates under s. 29 are always granted, so as to secure to the party delivering the particulars the costs of everything reasonably and properly inserted in them, although he may fail to prove the specific objection under which the detailed particulars may be ranged. The practice has grown up owing to the difficulty of doing justice as regards costs in any other way.

Solicitors for plaintiffs: *Baker, Blaker & Hawes.*

Solicitors for defendants: *Brook, Freeman & Batley, for Wright, Becket & Co., Liverpool.*

D. P.

DUNLOP PNEUMATIC TYRE COMPANY *v.* NEAL.

NORTH J.

1899

April 11.

[1898 D. 2136.]

Patent—Infringement—Injunction—Repair or Reconstruction of Patented Article—Article Manufactured at Request of Patentee's Agent.

The plaintiffs under their patent manufactured a pneumatic tyre for cycles, which consisted of a rubber or elastic tyre lined in canvas in combination with two wires for securing the same to the rims of the wheels. The defendant, at the request of an agent of the plaintiff company, who brought him one of the plaintiffs' tyres, which was old and worn out, placed over the old wires a new canvas cover and a new rubber tyre. The agent had been sent by the plaintiffs to find out whether the defendant was infringing their patent, but there was nothing to shew that the agent was authorized by them to request the defendant to do what he did:—

Held, that what the defendant had done went beyond fair repair of the tyre, and amounted to its reconstruction, and that he had therefore infringed the plaintiffs' patent:

Held, also, that the plaintiffs were not estopped by the act of their agent from complaining of the infringement.

Kelly v. *Batchelar*, (1893) 10 Rep. Pat. Cas. 289, distinguished, on the ground that in that case the plaintiffs had authorized their agent to direct the defendant to construct an article infringing their patent.

Held, further, that, though only the one act of infringement by the defendant was proved, and there was no evidence of any threat by him to infringe again, yet, as he had accepted the order from the plaintiffs' agent in the ordinary course of his business, it must be assumed that he would accept similar orders again, if they were offered to him, and consequently that he must be restrained by injunction from infringing the patent.

Motion by the plaintiffs for an interlocutory injunction to restrain the defendant from infringing their patent (No. 14,563 of 1890), known as the Welch patent, for pneumatic tyres for cycles, "by manufacturing or selling pneumatic tyres of the same construction as those described in the specification of the patent, or only colourably differing therefrom." One of the claims (No. 4) made by the complete specification of the patent was for "a rubber or elastic tyre having the form of a saddle or arch in section lined in canvas in combination with two wires or sufficiently inelastic cores for securing the same to the rims or tyres substantially as herein described."

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The validity of the patent had been established in prior actions.

The infringement by the defendant alleged by the plaintiffs was that one J. T. Rowland had taken him an old worn-out tyre made by the plaintiffs under the Welch patent, and that the defendant had constructed a new canvas cover and a new rubber cover and put into it the old wires. One of the wires was broken, and the defendant repaired it. Rowland paid the plaintiff for doing this work. According to the defendant's evidence, when Rowland brought him the old tyre "he invited me to reline and recover, and I merely did what he the agent of the company requested—put a new lining and a new rubber cover upon the same wires." Rowland deposed that he was not a regular agent of the company, nor in their employ. He added, "the plaintiff company informed me that the defendant was making infringing tyres under the guise of repairing old tyres, and asked me to see if it was so. Accordingly I took the old and worn-out cycle cover to him, and he pointed out how he was going to, what he called, repair the same, and brought me specimens of the india-rubber strips he intended putting on, and told me what the extra cost would be if I chose the best of them. . . . The wires in the new cover the defendant supplied me with may or may not be the same wires as were in the old cover I took him, but, if the wires are the same, then the defendant must have mended one of them, for it was broken when I handed the same over to him."

It was not alleged that the defendant had infringed the patent in any other instance, nor that he had threatened or that he intended to infringe again.

Moulton, Q.C., and *J. C. Graham*, for the plaintiffs. The question is whether the defendant has been making a new tyre, or only repairing the old one. It would be an infringement of the patent for him to do the former, but he could lawfully do the latter. Nothing was left of the old tyre but the wires, and one of them was broken and was mended by the defendant. What he did was not fair repair of the tyre; it amounted to reconstruction, and that is illegal. The sale of a patented

article by the patentee gives the purchaser the right to use the article which he buys during its life, and he may prolong its life by fair repairs. But the sale does not confer upon him the right to deal with the article in any way he pleases during any length of time, e.g., by reconstructing the article.

It may be contended on behalf of the defendant that the plaintiffs by their agent gave him leave and licence to do what he did, and that they cannot complain if that which he did was an infringement of the patent. The mere sending a man to try and find out whether the defendant was infringing cannot confer on him a licence to infringe.

T. Terrell, Q.C., and *Austen-Cartmell*, for the defendant. If a patentee by himself or by an agent invites a man to construct an article which is in itself an infringement of the patent, he cannot afterwards be heard to complain that the article made in pursuance of this request is an infringement: *Kelly* v. *Batchelar*. (1) This is the only infringement alleged against the defendant; he was instructed by the plaintiffs' agent to do a specific act, and he did it.

Again, the patent is for a combination, and there can be no infringement unless the whole combination is taken. The defendant has got two wires which the plaintiffs have licensed for use as part of the tyre of a cycle, and he has placed over them a fresh piece of canvas and a fresh strip of india-rubber. Neither of those things is new. In order that there should be an infringement, that which is taken must of itself be an infringement. The wires are of the essence of the combination, and, if the defendant does not take them, he does not infringe. If any part of the combination is licensed by the patentee, there is no infringement.

Moulton, Q.C., in reply. When a patentee sells a patented article he gives a licence to the purchaser to use that particular article during the fair period of its life, which may be prolonged by fair repair of the article not amounting to its reconstruction. The patentee does not give a licence to the purchaser to use in any way he pleases the material of which the article is composed.

(1) 10 Rep. Pat. Cas. 289.

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In *Kelly* v. *Batchelar* (1) the agent of the patentee was authorized by him to direct the defendant to make the article which was complained of as an infringement. In the present case Rowland was neither actually nor ostensibly armed with such an authority.

NORTH J. I think the present case is distinguishable from *Kelly* v. *Batchelar*. (1) The report shews (p. 290) that there I came to the conclusion that the person who directed the article to be made had authority from the patentee to give those instructions. In the present case I cannot see that any such authority was given by the plaintiffs to Rowland. [His Lordship read the above passage from Rowland's affidavit, and continued:—]

The agent was employed by the plaintiffs for the purpose of seeing what the defendant would do under given circumstances. The defendant does not say he knew that Rowland was an agent of the plaintiffs, or that he acted on that view at all. I have no doubt the defendant did not know anything of the kind. He would not have been nearly so candid as he in fact was, if he had known or suspected that Rowland was an agent of the plaintiffs. Under these circumstances it seems to me that *Kelly* v. *Batchelar* (1) does not apply, and therefore I do not follow it.

As regards what was done by the defendant I feel a little difficulty, because there is no suggestion of any threat on his part of continuing to infringe the patent in the future, and no injunction which I can grant now could prevent his completing and delivering and receiving payment for the particular article which has been actually dealt with. But when a man employed in the way of his trade accepts an order and points out to the purchaser the way in which he intends to execute it, and then comes here and asserts that he had a right to do what he did, this shews that he is doing it in the ordinary course of his trade, and that he would do the same thing again if any one else should come to him on a future occasion and give a similar order. Under these circumstances I think the

(1) 10 Rep. Pat. Cas. 289.

plaintiffs are entitled to an injunction in the terms of the notice of motion.

I should add that I do not think the defendant is justified in saying that the mere fact that the wires had been used in an article made by the plaintiffs is a licence to him to use them for any article of the same kind with which they could be used. In my opinion the only licence or authority given by the sale by the plaintiffs was that the tyre, including the wires, might be used till it should be worn out. Any simple repairs might be done by any person without licence from the manufacturer. But when a person takes the whole thing and makes and sells that which is really a new tyre, having merely the old wires in it, there is no licence from the plaintiffs to use the old wires for the purpose of putting them into a new article making up precisely the combination which is the subject of the letters patent.

Solicitors: *J. B. & F. Purchase; L. W. Taylor.*

W. L. C.

PHILLIPS *v.* PROBYN.

[1898 P. 2876.]

Settlement—Validity—Illegal Consideration—Marriage with Sister of Deceased Wife.

On April 30, 1873, a widower executed a deed, by which, in contemplation of a marriage which "had been agreed upon and was intended shortly to be solemnized" between himself and Clara Probyn, he conveyed real estate to trustees in fee, to the use of himself and his assigns during his life, with remainder to the use of Clara Probyn during her life, "provided she shall remain a widow and unmarried; and from and immediately after her decease or marriage, whichever event shall first happen," to such uses as the settlor should by deed or will appoint, and, in default of appointment, to the use of such person or persons as would be entitled thereto if the deed had not been executed. Clara Probyn was in fact a sister of the settlor's deceased wife, though this was not stated in the deed. On March 5, 1877, he went through the ceremony of marriage with her, and she afterwards lived with him as his wife. He died in November, 1891, intestate. He had not exercised the power of appointment by deed reserved to him by the settlement. During the life of his

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son and heir-at-law Clara Probyn received the rents of the property without objection on his part.

Upon a summons taken out after the son's death by the trustees of the settlement against Clara Probyn and the son's heir-at-law and administratrix to determine who was entitled to the property:—

Held, that the trust for Clara Probyn was illegal and invalid, and that the property was held on trust for the son's administratrix, she being, under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), his real representative.

Ayerst v. *Jenkins*, (1873) L. R. 16 Eq. 275, distinguished.

SUMMONS by the trustees of a settlement dated April 30, 1873, for the determination of the questions whether the defendant Clara Probyn was beneficially entitled during her life, or for any and what less estate, to the property comprised in the settlement, or, by reason of her being the sister of the deceased wife of Richard Sloper, the settlor, the defendants Richard John Sloper and Mary Jane Sloper, or either of them, were or was now beneficially entitled to the property.

The settlor, Richard Sloper, married his first wife on November 10, 1853. She died on October 22, 1860, leaving a son, John Robert Sloper, who was born on March 3, 1856. On August 22, 1862, Richard Sloper married Margaretta Probyn. On February 11, 1872, she died without having had any issue. On March 5, 1877, Richard Sloper went through the ceremony of marriage with Clara Probyn, a sister of his deceased second wife. The deed executed on April 30, 1873, was made between Richard Sloper, described as "of Aberaman, Aberdare, Glamorganshire, surgeon," of the first part; Clara Probyn, described as "of the same place," of the second part; and two trustees of the third part. The deed contained recitals that Richard Sloper was seised or otherwise well entitled for an estate of inheritance in fee simple of and in a messuage and premises in Pontypool; that "a marriage hath been agreed upon and is intended shortly to be solemnized between the said Richard Sloper and Clara Probyn"; and that "the said Richard Sloper is desirous prior to such solemnization of settling the said premises aforesaid in manner hereinafter mentioned." And it was witnessed that, "in pursuance of such desire and in consideration of the premises and of the sum of 5*s*. this day

paid by" the trustees to Richard Sloper, he did thereby grant, convey, &c., to the trustees, their heirs and assigns, the said messuage and premises, to hold the same unto the trustees, their heirs and assigns, for ever, to the use of Richard Sloper and his assigns during his life; and from and immediately after his decease to the use of Clara Probyn during her life, "provided she shall remain a widow and unmarried; and from and immediately after her decease or marriage, whichever event shall first happen," to the use of such person or persons and upon such trusts and in such manner as Richard Sloper should by deed or will from time to time direct or appoint; and in default of such direction or appointment, or so far as such direction or appointment should not extend, "to the use of such person or persons as would be entitled thereto if this deed had not been made or executed." It was not stated in the deed that Clara Probyn was the sister of the settlor's deceased wife. On August 2, 1878, J. R. Sloper married. On November 12, 1891, Richard Sloper died intestate, leaving surviving him Clara Probyn, and J. R. Sloper, his only child. Clara Probyn had no issue. Richard Sloper had not exercised the power of appointment by deed given to him by the settlement of April 30, 1873.

On August 4, 1893, an agreement was entered into between J. R. Sloper and Clara Probyn for the purpose of settling a dispute which had arisen between them as to the right to some furniture which had belonged to Richard Sloper. This agreement contained the following recital: "Whereas the said Clara Probyn otherwise Sloper some years since went through the ceremony of marriage with the said Richard Sloper but she being a sister of his deceased wife such marriage was illegal and contrary to law."

On September 2, 1898, J. R. Sloper died intestate, leaving surviving him his wife and an infant son, R. J. Sloper, who was his heir-at-law and also the heir-at-law of Richard Sloper. Administration to J. R. Sloper was granted to his widow. After the death of Richard Sloper, and during the life of J. R. Sloper, Clara Probyn received the rents of the property comprised in the settlement without objection on his part.

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Gatey, for the trustees, stated the facts.

Badcock, for the administratrix of J. R. Sloper and his infant heir. The settlement is invalid because the consideration for it was immoral and illegal. It appears on the face of it that the settlor was about to live in concubinage with the lady. This application is not to set aside the settlement, but the Court is asked to construe it. Clara Probyn does not come within the words of the trust; she is not "a widow and unmarried," for she has never been married. *Ayerst* v. *Jenkins* (1) is distinguishable. There the plaintiff, who was the legal personal representative of the settlor, sought to set aside the settlement, and it did not appear on the face of it that he and the woman were about to live in concubinage. It appeared to be merely a voluntary deed. The decision was that the Court would not at the instance of the settlor or his representative set aside a settlement which did not appear on the face of it to have been made for an illegal consideration.

[NORTH J. In the present case there is nothing in the deed to shew that the parties were about to live in concubinage. There is nothing to shew that the settlor had been previously married.]

It is clear that they contemplated living as man and wife.

In *Coulson* v. *Allison* (2) the settlement was made by the lady, and it was set aside because it was not shewn that she had been fully informed as to her position. In that case Lord Campbell L.C. (see p. 525) was evidently of opinion that the fact that the transaction was completed, and the property vested in the trustees, would not of itself have been a bar to its being set aside on the ground of illegality.

In *In re Vallance* (3) Kay J. held that a bond given by a man to a woman with whom he was cohabiting was not void when it was not shewn to have been given in consideration of future cohabitation. In *Hall* v. *Palmer* (4) a bond given in consideration of past cohabitation was held to be valid. But Wigram V.-C. said (5): "A bond given in consideration, either

(1) L. R. 16 Eq. 275.
(2) (1860) 2 D. F. & J. 521.
(3) (1884) 26 Ch. D. 353.
(4) (1844) 3 Hare, 532.
(5) 3 Hare, 536.

in the whole or in part, of future cohabitation, was void; or, stating the rule in other words, if the security was of such a nature as to hold out an inducement, or constitute to either party a motive, to continue the connection, the instrument would be void."

G. W. M. Dale, for Clara Probyn. *Ayerst* v. *Jenkins* (1) is really in favour of my client. In that case a distinction was drawn between bonds and contracts in fieri, and deeds by which property is actually vested in trustees in trust for the lady. Lord Selborne in his judgment said (2): "It may be that the door of this Court is not closed against persons repenting of such an unlawful connection, and desirous of extricating themselves from fetters which, if relief were refused, might practically bind them to it. But in a case presenting no such circumstances, I think it consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the defendants' trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law." It makes no difference that in that case there was no recital of an illegal consideration. A bond cannot be enforced when the consideration for which it was given is illegal, because it is in fieri. But here an attempt is in effect being made to set aside a settlement which is completed. A Court of Equity will not interfere to do this.

[NORTH J. I am not asked to set aside the deed; the trustees ask the Court to tell them to whom they ought to account.]

Ayerst v. *Jenkins* (1) covers the present case. Indeed, the present case is stronger, because after the settlor's death his heir-at-law recognised and adopted the settlement. His conduct amounted to a fresh agreement between himself and Clara Probyn.

[NORTH J. It comes only to this, that for seven years he did not interfere with the receipt of the rents by her, though he enforced his rights as to the testator's personalty. The ground of the decision in *Coulson* v. *Allison* (3) was that a

(1) L. R. 16 Eq. 275. (2) L. R. 16 Eq. 284. (3) 2 D. F. & J. 521.

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fiduciary relation subsisted between the settlor and the lady, and that he had not fully informed her of her position.]

Badcock, in reply. There was no acquiescence by the heir. The Statute of Limitations has not begun to run.

In *Ayerst* v. *Jenkins* (1) the facts were very different. In that case there was no contract for a settlement. Here it appears that the settlement was made with a view to cohabitation. In *Wootton* v. *Wootton* (2) as Lord Selborne, in *Ayerst* v. *Jenkins* (3), said, there was a mutual settlement "from which both parties desired, or were at least willing, to be relieved." When land is conveyed to trustees there is a resulting trust for the grantor so far as no valid trust is declared by him, and here no valid trust is declared after the trust for the settlor for his life.

NORTH J. The settlement was avowedly made upon a lady who was the sister of the settlor's deceased wife in contemplation of what is called his marriage with her. It is in fact indorsed "Settlement on Marriage." In the declaration of the trusts there is an omission of a limitation which one would have expected to find—namely, a limitation to the use of the settlor until the solemnization of the intended marriage. After the limitation of a life estate to him, there comes a limitation to the use of Clara Probyn during her life, "provided she shall remain a widow and unmarried." On the face of it the settlement appears to be a valid one; and it would have been valid, if Clara Probyn had not been the sister of the settlor's deceased wife. But the fact is clear that she was his deceased wife's sister. I take it that both parties knew that they could not legally marry, and that such a marriage would be invalid. Indeed, the agreement of August 4, 1893, contains a recital that the marriage was illegal. It has not been suggested that the illegality was not known to the parties at the time. In my opinion it is clear that the settlement was made with a view to what is called a marriage which had been then agreed upon between the parties. The deed was not expressed to be a

(1) L. R. 16 Eq. 275. (2) Before Stuart V.-C., June 9, 1869, unreported.
(3) L. R. 16 Eq. 284.

voluntary one, but as made for a consideration which under the circumstances could not legally take effect, and which must continue to be illegal so long as the parties lived. It seems to me that the settlement was made with a view to the future cohabitation of the parties. Only a woman who had been a wife could become a widow.

In *Coulson* v. *Allison* (1) freehold property was conveyed by Ann Welbank, who had gone through the ceremony of marriage with John Nicholson, the husband of her deceased sister, to him absolutely, the grantor being described in the deed as his wife. And Lord Campbell said (2): "Supposing even both Nicholson and Ann Welbank to have been aware of the true state of the law, and to have nevertheless agreed to cohabit together, she being his mistress and not his wife, it seems to me the deed would then have been impeachable on the ground of immorality, for nothing can well be conceived more immoral than for a woman to make over the whole of her property to a man in contemplation of continuing an illicit intercourse with him for the remainder of their joint lives." These observations were referred to with approval by Lord Selborne in *Ayerst* v. *Jenkins*. (3) It is true that Lord Selborne pointed out that Lord Campbell's observations referred to a state of things very different from that which arose in *Ayerst* v. *Jenkins* (4), and that they did not apply to that case. But the reason why they did not apply was that the person who was seeking to set aside the settlement was the personal representative of the settlor, and the Court would not assist the settlor or his representative to set aside the settlement. No doubt the settlement would have been void against creditors of the settlor, but the Court would not set it aside at his instance. In the present case I have not to consider what the position of matters would have been if Richard Sloper, or his son or his grandson, had been the plaintiff in the action. But here the trustees are in receipt of the rents of the settled property, and they want to know to whom they ought to pay them. I cannot see that there is any such an estoppel against the defendants, as there

(1) 2 D. F. & J. 521.
(2) Ibid. 525.
(3) L. R. 16 Eq. 284.
(4) Ibid. 275.

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was against the plaintiff in *Ayerst* v. *Jenkins* (1), as prevents the Court from deciding in their favour; and the Court is bound to assist the trustees. In my opinion the trust for Clara Probyn for her life is illegal and invalid, and the trustees hold the property on trust for the legal personal representative of J. R. Sloper, who is, by virtue of the Land Transfer Act, 1897, his real representative.

Solicitors: *Purkis & Co.; Crowders, Vizard & Co.; E. & J. Mote.*

W. L. C.

NORTH J. 1899 April 21.

In re LANDOR (A SOLICITOR).

Solicitor and Client—Common Order for Delivery and Taxation of Bill of Costs—No Costs claimed by Solicitor—Liability to render Cash Account.

Under the common order for the delivery and taxation of a solicitor's bill of costs, if the solicitor makes no claim for costs, and swears that he has not retained any costs out of moneys of his client in his hands, he is not liable to deliver a cash account to his client.

Semble, that under such circumstances the solicitor would still be liable to account to the client upon a proper application under the summary jurisdiction over solicitors.

MOTION on behalf of James Moxon, asking that he might be at liberty to issue a writ of attachment against Robert Landor, a solicitor, for his contempt in not delivering to the applicant a bill of costs, pursuant to an order dated December 23, 1898.

Landor had acted as solicitor for Moxon, and the order, which was the common order for the delivery and taxation of a solicitor's bill of costs, was made on the petition of Moxon. The order directed that the solicitor should, within a fortnight after service of the order, deliver to the petitioner a bill of fees and disbursements in all suits, causes, actions, and other matters of business in which he had been employed as the solicitor for the petitioner, and that it be referred to the taxing master to tax and settle the same. And it was ordered that

(1) L. R. 16 Eq. 275.

the solicitor should give credit for all sums of money by him received of or on account of the petitioner.

The order was duly served on Landor on January 7, 1899.

The order not having been complied with, notice of the present motion, dated January 31, 1899, was duly served on Landor.

On February 22, 1899, Landor made an affidavit in which he said: "I fully intended to make out an account of my professional charges, but I find that, owing to the long lapse of time since I acted for the applicant, it is impossible for me now to make out a satisfactory bill of costs . . . . I make no claim for any costs against the applicant. In fact my claim was wholly statute-barred, and, but for the applicant's submission to pay, I could not have made any claim, and I have determined to make no claim."

Moxon made an affidavit on February 28, 1899, in which he stated that in the year 1891 Landor borrowed from him a sum of 400*l.* for a short period of about six months upon a bill of exchange, accompanied by a deposit of some shares in a colliery company. "At the time when the said Robert Landor applied to me for a loan I said to him that the amount which he would have to pay at due date of the bill of exchange would be much reduced, as there would be his costs on a proposed sale of property which I was about to make to be deducted, and on other matters, and to this the said Robert Landor assented." Moxon went on to state various matters in which since 1891 Landor had acted as his solicitor, and said that he had made repeated applications to Landor for the delivery of his accounts and bills of costs without success. Ultimately Moxon applied for and obtained the order of December 23, 1898. He added that he believed the reason why Landor now stated that no costs were due to him was "because he has purported to pay himself the amount of the said bills of costs by means of a set-off against the amount which he owed me in respect of moneys borrowed from me as aforesaid."

F. Whinney, for the client. The solicitor says that he has no bill to deliver, and that he claims no costs from the client.

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That is not an answer to the motion, for it is quite consistent with what he says that he has paid himself his costs out of his client's money in his hands for which he is bound to account.

Ashton Cross, for the solicitor. The solicitor has not retained any costs out of his client's money. He has relinquished his claim for costs and has no bill to deliver. He admits that he is accountable for all moneys which he has received from or for his client. But he cannot be required to deliver a bill when he makes no claim for costs.

F. Whinney, in reply. If the solicitor's contention is right, he will be able to escape from accounting to his client under the summary jurisdiction of the Court over solicitors.

NORTH J. It seemed to me at first quite clear that the solicitor must deliver a bill of costs and furnish a cash account of moneys received by him from or on behalf of the client, and that the solicitor could not escape from that liability by paying himself his costs out of moneys of the client in his hands, and then saying that no costs are due to him from his client. But the case stated by Mr. Ashton Cross goes far beyond the affidavit which has been filed by the solicitor. He in effect admits that the solicitor has done work for the client, but says that he has never received anything on account of his costs, and that he relinquishes his right to receive anything. The result is that there are no costs to be set off against moneys due from him to his client, and he must account for all sums which he has received from or on behalf of his client, without deducting anything for his costs. It is said that even if the solicitor had filed an affidavit going to the extent of what has been stated by his counsel, he ought still to deliver a cash account; because otherwise he would escape the summary jurisdiction of the Court under the Solicitors Act. I do not think he could do this if a proper application were made by the client. But in my opinion the common order to tax does not involve the taking of an account of all monetary transactions between the solicitor and his client independently of costs due from the client. If an affidavit is made by the solicitor to the effect that no costs are due to him by the

client, and that he has not paid himself any costs out of his client's moneys, no order will be made, except that the solicitor do pay the costs of the motion.

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Solicitors: *A. S. C. Doyle, for James E. Moxon, Hanley; Mills, Curry & Gaskell.*

W. L. C.

In re BETTY.
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NORTH J. 1899 *April* 12, 27.

[1897 B. 2508.]

Equitable Tenant for Life—Liability—Covenants—Repairs—Insurance.

An equitable tenant for life of leaseholds under a will is bound, during the continuance of his interest, as between himself and his testator's estate, to perform the tenant's continuing obligations under the lease; but he is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant which had arisen before the testator's death.

In re Courtier, (1886) 34 Ch. D. 136, considered.

In re Tomlinson, [1898] 1 Ch. 232, differed from.

THIS was the further consideration of an action for the administration of the estate of Henry Thomas Betty, who died on April 15, 1896, having made a will by which he appointed Edward Ledger, Arthur Stirling, and the plaintiff, Ann Starkey or Betty, his adopted daughter, executors and trustees of his will. The will was proved by Ann Betty, the plaintiff to the summons, alone, the other executors and trustees having renounced.

The testator's will contained the following bequest: "I bequeath my estate of the Betony Thurlow Park Road West Dulwich Surrey viz.:—house gardens stabling green-houses and other erections together with all my household furniture plate watches linen clothes jewellery china glass wines spirits books pictures stage dresses mares horses carriages and other effects of a like nature that I have now and may be hereafter possessed of to Edward Ledger, Arthur Stirling and my adopted daughter Ann Starkey or Betty upon trust to permit my adopted

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daughter Ann Starkey or Betty to have the personal use and enjoyment of the said house gardens stabling and other erections together with all my household furniture plate watches linen clothes jewellery china glass wines spirits books pictures stage dresses mares horses carriages and other effects during her life for her sole use and benefit separate and independent of any husband she may marry and to be delivered to her immediately after my death and after her decease upon trust to sell and convert the same into money to form part of my residuary estate."

The testator bequeathed his residuary estate "to form a fund for poor actors and actresses, to be called 'The Betty's Fund for Poor Actors and Actresses,' the interest to be distributed in small sums to each recipient as occasion requires. The names to be announced in the *Era* newspaper. The distribution of the moneys to be under the sole control of Edward Ledger. After his death an appointment to be made by the executors." Edward Ledger refused to act as trustee, and the Attorney-General was made the defendant to the summons.

The testator held "The Betony" as assignee of a building lease from Dulwich College for a term of eighty-four years from December 25, 1874, at the annual ground-rent of 39*l.* 11*s.* 4*d.* The lease contained several covenants on the part of the lessee, including covenants to keep the premises in repair and insure against fire.

A point for the consideration of the Court was to what extent, if at all, the plaintiff as equitable tenant for life was liable to pay the rent reserved by, and to perform the covenants contained in, the lease, and to insure the house and furniture and chattels. Minutes had been prepared on behalf of the plaintiff containing declarations that she was not liable in respect of her equitable estate for life to pay rent or perform the covenants contained in the lease, or insure the house or chattels, but that she was bound, as sole trustee of the will, to provide such expenses out of the estate.

Everitt, Q.C., and *Henry Fellows*, for the plaintiff. The law is that an equitable tenant for life under a will of leaseholds is

under no liability to the lessee, and, as between himself and the general estate of the testator, is entitled to have the covenants in the lease performed at the expense of the testator's estate. The law on this point is settled by the judgments of the Court of Appeal in *In re Courtier* (1), and the decisions of Kekewich J. in *In re Baring* (2); *In re Tomlinson.* (3) The case of *In re Fowler* (4), before Fry J., at first sight looks the other way. But that decision was not one between the tenant for life and the estate of his testator. It did not decide whether, if there were available assets, the tenant for life could not get the repairs paid out of those assets. There was also a recent case before Stirling J.—*In re Redding* (5)—where the learned judge doubted whether the view Kekewich J. took in *In re Baring* (2) of *In re Courtier* (1) was correct; but the point was not really in issue, and the case of *In re Tomlinson* (3), which was exactly like the present, has since been decided.

Whatever might have been the case had the testator settled the whole leasehold interest specifically, giving a life interest to A. and remainder to B., giving the residue elsewhere, we submit that, by letting the remainder fall into the estate and giving the plaintiff the right to occupy the house, he has shewn an intention that she is to have that house free of all expenses.

Ingle Joyce, for the defendant. Apart from the interpretation put upon the case of *In re Courtier* (1) by Kekewich J. in *In re Baring* (2), which is not the same case as this, and in *In re Tomlinson* (3), which it is hard to distinguish from the present case, there can be no doubt that a tenant for life, though equitable tenant only and not liable to the lessor, is bound to bear the burdens naturally incident to the property under the terms of the lease, such as payment of rent, keeping the property in repair, and insuring if there be a covenant to insure: Williams on Executors, 9th ed. p. 1647; *Fitzwilliams* v. *Kelly* (6); *Marshall* v. *Holloway* (7); *Hickling* v. *Boyer* (8);

(1) 34 Ch. D. 136.
(2) [1893] 1 Ch. 61.
(3) [1898] 1 Ch. 232.
(4) (1881) 16 Ch. D. 723.
(5) [1897] 1 Ch. 876.
(6) (1852) 10 Hare, 266.
(7) (1832) 5 Sim. 196.
(8) (1851) 3 Mac. & G. 635.

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Bothamley v. *Sherson* (1); *Hawkins* v. *Hawkins* (2); *Eccles* v. *Mills* (3); *Garratt* v. *Lancefield.* (4)

But the judgments of the several Lords Justices in *In re Courtier* (5) do not bear the interpretation attempted to be put upon them. The question before the Court was whether repairs necessary at the death of the testator were to be borne by his general estate, and the judges held that the estate was liable; but they went no further. The actual decision of Kekewich J. in *In re Baring* (6) does not touch this case. The later case of *In re Tomlinson* (7), if it applies, was against the long current of authorities, and against the recent opinion of Stirling J. expressed in *In re Redding* (8), and against the common sense view, and inconsistent with the law applicable to other legacies.

[*Theobald, Q.C.*, amicus curiæ, mentioned *Kingham* v. *Kingham.* (9)]

Everitt, Q.C., in reply.

April 27. NORTH J., after holding that the plaintiff was equitable tenant for life of the Betony, and entitled not merely to occupy the premises, but also to let them and receive the rents, and to sell them under the Settled Land Act, proceeded as follows:—The question is whether the plaintiff ought to bear the expenses referred to in the proposed minutes, or whether the testator's estate ought to bear them. With respect to that, there is a certain amount of conflict of authority. The general rule is stated in Williams on Executors, 9th ed. p. 1647, in this way: "Unquestionably the general rule is that the legatees of leasehold estates must take them cum onere, and notwithstanding that the general personal estate may remain liable to the lessor by reason of the covenants contained in the lease." That liability is not found here, as the testator was only assignee; but the general rule is stated in that way. Of course I need hardly mention that if a testator indicates in his will

(1) (1875) L. R. 20 Eq. 304.
(2) (1880) 13 Ch. D. 470.
(3) [1898] A. C. 360.
(4) (1856) 2 Jur. (N.S.) 177.
(5) 34 Ch. D. 136.
(6) [1893] 1 Ch. 61.
(7) [1898] 1 Ch. 232.
(8) [1897] 1 Ch. 876.
(9) [1897] 1 I. R. 170, 174.

that the particular charges are to be borne by the tenant for life, or are to be borne by his estate, there is an end of the question, and nothing remains to be decided. In the present case there are no words in this will indicating either intention. In fact, there is nothing further in the will than the particular passage I have read.

[His Lordship stated the facts of and read passages from the judgments in the following cases: *Fitzwilliams* v. *Kelly* (1); *Armstrong* v. *Burnet* (2); *Day* v. *Day* (3); *Bothamley* v. *Sherson* (4); *Hawkins* v. *Hawkins* (5); and *Eccles* v. *Mills* (6), and continued:—]

The next case I have to mention is one that came before Kekewich J.: *In re Baring.* (7) [His Lordship stated shortly the facts of that case, and continued:—] In that case the sole question was as to covenants broken after the testator's death. Kekewich J. said he would have thought it clear that the tenant for life ought to keep down the charges but for the fact that he was instructed differently by the recent case of *In re Courtier* (8) in the Court of Appeal; and in the result, having regard to that case, he came to the conclusion that the legatee was free from all obligation to observe the covenants.

I will now turn to *In re Courtier* (8), in which case there are little differences between the will the subject of decision in that case and the will of the testator here; but taking it as a whole, I think the will was similar to the present. There was a gift of residue of real and personal estate to the testator's wife for life, with a direction that the same was to be sold after her death. At the testator's death the property was out of repair; and a considerable expenditure upon it was necessary. The widow had kept the property in the state in which it came to her; but denied that she was liable, as tenant for life, to do the repairs which had become necessary during the lifetime of the testator. In my opinion that was the only point decided.

[His Lordship read from the judgment of Cotton L.J. the

(1) 10 Hare, 266, 273, 276.
(2) (1855) 20 Beav. 424, 432.
(3) (1860) 1 Dr. & Sm. 261; 29 L. J. (Ch.) 466.
(4) L. R. 20 Eq. 304, 316.
(5) 13 Ch. D. 470.
(6) [1898] A. C. 360, 369, 371, 372.
(7) [1893] 1 Ch. 61.
(8) 34 Ch. D. 136.

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passage (1): "There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits. She is to enjoy these leaseholds in specie, but she is under no covenants to repair, and there is nothing in the will to shew that the testator intended her only to have the net rents after making provisions for the liabilities that arose in the testator's lifetime. It cannot be fairly left to the widow to make good the deficiencies of the testator."] Fry L.J. says (2): "With respect to the first question, whether the Court has power to order the tenant for life to put the premises into repair which were out of repair at the death of the testator, I am unable to find any principle or rule of law which throws any obligation on her to do this; and as there is an entire want of authority in its favour, it is clear that there is no such obligation." It seems to me that those two learned judges are clearly referring to the liability with respect to the particular repairs in question—that is, the repair of the premises so far as they had fallen out of repair during the lifetime of the testator. Bowen L.J. says (2): "The first question on this appeal is whether the tenant for life is bound to keep the leaseholds in such a state of repair as to prevent forfeiture. These houses are given to the widow during her life. What obligation is there on her?" I admit that those words are not quite as specific as those of the other two learned Lords Justices. He does not distinguish in terms between disrepair in the lifetime of the testator and subsequent disrepair; but though, no doubt, his words are larger, I do not see any reason to suppose he was dealing with anything beyond the matter in hand, or that he was taking a different view from that which the other learned judges had taken. It seems to me clear that he was dealing solely with the state of things arising from the property having fallen out of repair in the lifetime of the testator.

Then a similar question came before Stirling J. in *In re Redding*. (3) He had in the will in that particular case words shewing that the property was to be kept in repair by the legatee. It is not worth while considering that now. But

(1) 34 Ch. D. 139. (2) 34 Ch. D. 141.
(3) [1897] 1 Ch. 876, 879.

his Lordship did point out with regard to *In re Courtier* (1): "I feel bound to say that, having read it carefully, I am unable to put the construction on the language used by the various members of the Court of Appeal which seems to have been put on it in *In re Baring*. (2) Certainly in point of decision *In re Courtier* (1) does not cover the present case, because it was exclusively directed to the question whether the tenant for life was bound to discharge the liabilities in respect of repairs to property which had accrued at the death of the testator." That is the construction he puts upon *In re Courtier*. (1)

The matter came before Kekewich J. again in *In re Tomlinson* (3), which is substantially like the present case. Kekewich J. having had the observations of Stirling J. which I have last read called to his attention said: "There is a good deal to justify the conclusion at which he arrived; but with great respect I do not think the judgments will bear the narrow interpretation he put upon them." A little further on he said: "In my opinion the essence of the decision"—that is, in *In re Courtier* (1)—"is this—not that the tenant for life is not bound to do what is necessary to keep the property in the state of repair in which it was at the testator's death, but that he is not bound to do anything at all under the covenants in the lease." So that he took the view that *In re Courtier* (1) was to be considered in that larger sense which I have pointed out my reasons for thinking it should not; and I am confirmed in that view by Stirling J.'s view, and also by a recent case of *Kingham* v. *Kingham* (4) before the Vice-Chancellor of Ireland. There a testator directed his executors and trustees to allow his wife if she pleased to occupy his house during her life with the use of the furniture, and that after her death the same might be sold and the proceeds divided among the testator's children. The Vice-Chancellor went fully into the matter, and said (5): "I venture to differ from Kekewich J., in regarding the decision of *In re Courtier* (1) as in effect concluding the question which was before him, and is now before me. I am of opinion that a

(1) 34 Ch. D. 136.
(2) [1893] 1 Ch. 61.
(3) [1898] 1 Ch. 232, 235.
(4) [1897] 1 I. R. 170.
(5) [1897] 1 I. R. 174.

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tenant for life, whether legal or equitable, is within the maxim Qui sentit commodum sentire debet et onus: that he is bound to take the onus with the commodum, and that as head-rent and taxes are ordinary burdens which a tenant in occupation of leaseholds must bear, the testator's widow is liable to pay them out of her own money during her occupancy. There is nothing in the language used by the testator to alter this liability." So that he takes the same view of *In re Courtier* (1) as Stirling J. has done, and as I have done; and if that is the correct view, it applies to the present case. There is this further to be said about it; if that construction is put upon *In re Courtier* (1), it is quite consistent with all the other decisions; but if Kekewich J. is correct, it would entirely alter the law as laid down in the numerous cases to which I have referred. I do not think it could possibly have been the intention of the Lords Justices to overrule the old law on that point, and to lay down new law, without giving any reasons for so doing. It seems to me, therefore, that in this case the tenant for life must bear the burden.

Now I have a word to say about those burdens in connection with the remaining portion of the judgment in *Kingham* v. *Kingham*. (2) There the learned judge said: "I think there is a distinction to be taken between the payment of rent and taxes and of the premium of fire insurance, because an ordinary tenant is not bound to keep premises demised insured against fire in the absence of express contract or obligation. I think the trustees are bound to take care that the premises are insured against fire, so as to preserve the property for their cestuis que trust, and that they cannot require these premiums to be repaid them by the widow. The other matter is as to repairs. In my opinion this lady is not liable to pay for any repairs which became necessary before her occupation. The repairs she will be liable for are such as an ordinary tenant would be bound to make on the premises by his common law obligation. I shall therefore declare that the widow is liable to pay all head-rent and taxes ordinarily paid by an occupying tenant, and to pay for all repairs and damages to the premises

(1) 34 Ch. D. 136. (2) [1897] 1 I. R. 170.

which have accrued, or shall accrue, during her occupation, such repairs to be confined to those for which an occupying tenant is ordinarily liable in the absence of express contract, and that she is not liable to any outgoings save those above mentioned; and that it is the duty of the trustees to keep the premises sufficiently insured against fire, and to perform all necessary repairs other than those specified."

I feel a good deal of difficulty upon that case as to the repairs and insurance. The case may be perfectly right according to the law of Ireland. I do not mean to suggest for a moment that it is not, and that may be the explanation of it; but if the law of Ireland and the law of England is the same in this respect, I do not see how the legatee of leaseholds can have to do any repairs arising out of any common law obligation. What the cases, beginning with *Fitzwilliams* v. *Kelly* (1), the first I read, to *Eccles* v. *Mills* (2), the last I read, say, is as Lord Macnaghten put it, namely, the question is, What are the covenants incident to the relation of landlord and tenant? It is those covenants, incident to that relation of landlord and tenant, which the legatee of leaseholds has to perform. In my opinion, therefore, what the legatee must bear in this case is the obligation of the covenants in the lease which have to be performed by the lessee for the benefit of the lessor. They include the rent, of course, and repairs; they include insurance if there is a covenant to insure; but they do not include insurance if there is no covenant to insure.

When speaking of insurance, I refer to insurance payable under the lease—that is, in respect of the premises. I do not think the tenant for life is bound to keep the furniture insured; in point of fact, she has no interest in the furniture except to use it. If she does not insure the furniture and it happens to be burnt, she can no longer enjoy it; but I think that she, as executrix and trustee, ought to insure it at the expense and for the benefit of the estate: that is because the furniture belongs, subject to the tenancy for life, to the estate.

I wish to refer to two observations made by Mr. Everitt. He says that this lady is only tenant for life, and not absolutely

(1) 10 Hare, 266. (2) [1898] A. C. 360.

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entitled to the leasehold. It seems to me that the question arises between the persons entitled to the leasehold on the one hand, and the persons entitled to the residue on the other hand, and it cannot matter whether the leasehold is given to A. for life with remainder to B., or to A. absolutely; because A. and B. in the one case, and A. in the other, take the whole leasehold interest, and they are the persons who, in my opinion, should bear the burdens. Then Mr. Everitt points out that there is a difference in this case because the property is to fall into residue after the death of the tenant for life. I do not see how that makes any difference. If the tenant for life would have to bear those expenses, in case the leaseholds were given to her for life with remainder to B., I do not think it is important to consider who takes in remainder: whether it is B. as specific legatee, or whether the residuary legatees of the testator's will are the persons who take.

Solicitors: *Vallance & Vallance; Solicitor to the Treasury.*

D. P.

In re MOUAT. KINGSTON COTTON MILLS COMPANY *v.* MOUAT.

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March 22, 28.

[1899 M. 235.]

Fraudulent Conveyance—Protection of Creditors—Voluntary Assignment of Policy of Assurance—Investment of Policy Moneys by Assignee—Creditors' Administration Action—Following Assets—13 *Eliz. c.* 5.

A testator voluntarily assigned two policies of assurance to his niece, who on the death of the testator, which happened shortly afterwards, received the policy moneys and invested them with other moneys of her own upon mortgage. The testator's estate proved to be insolvent. In a creditors' administration action the validity of these assignments was impeached under 13 Eliz. c. 5, and the plaintiffs moved for an order for payment into court of the policy moneys, or for a receiver:—

Held, that, if the fund existed in specie, it would be assets of the testator, assuming the assignments to be within the Statute of Elizabeth, and the Court would have jurisdiction to secure the fund for the benefit of the creditors until the determination of that question; and that there had been no such alteration in the nature of the fund as to oust the jurisdiction of the Court, the fund being still in the hands and under the control of the assignee, although not in its original shape; and, accordingly, the Court exacted an undertaking from the assignee not to receive the moneys secured by the mortgages, so far as they represented the policy moneys, and not to deal with the mortgages except with the sanction of the Court.

By two deeds of assignment dated October 29, 1890, and May 22, 1894, the testator in the action voluntarily assigned to his niece, then Miss Livingston, now the defendant Mrs. Dalzell, two policies of assurance on his own life granted by the Life Association of Scotland and the Scottish Provident Institution respectively, and he gave due notice of the assignments to the insurance companies.

The testator died on April 11, 1895.

On April 27, 1895, and May 16, 1895, the policy moneys were received on Mrs. Dalzell's behalf by her brother, and were shortly afterwards invested by him on mortgage for her with other moneys of hers which she handed to him.

The testator's will was proved on June 6, 1895, by the defendant Miss Robina Ann Mouat, the sole executrix thereof.

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His estate proved to be insolvent, and the present action was brought by the plaintiffs, on behalf of themselves and all other creditors of the testator, for administration, and for a declaration that the assignments were fraudulent under 13 Eliz. c. 5, and for consequential relief.

The plaintiffs now moved for an order for payment by the defendant Mrs. Dalzell of the policy moneys into Court to the credit of the action, or in the alternative for the appointment of a receiver.

Upjohn, Q.C., and *Hon. T. H. Watson*, for the plaintiffs. Assuming the assignments to Mrs. Dalzell to be void as against creditors under the Statute of Elizabeth, we are entitled to follow this property. The policy moneys are impressed with a trust to pay the testator's creditors, and are now held by Mrs. Dalzell in a fiduciary capacity. We therefore claim to have these moneys protected until the trial by the appointment of a receiver or otherwise.

Dunham (*Jenkins, Q.C.*, with him), for the defendant Mrs. Dalzell. The plaintiffs are simply creditors.

[*Upjohn, Q.C.*, referred to *Shears* v. *Rogers*. (1)]

I admit that the property would be assets of the testator; but it has been converted and invested on mortgage with other moneys before the creditors elected to avoid, and the proceeds cannot be followed. The effect of setting aside the assignments would be to vest the policies in the executrix through the testator; but the policies no longer exist, and it has never been held that the assignee of a deed capable of being avoided under the Statute of Elizabeth is a trustee for the creditors of the assignor. This case is really governed by *Lister & Co.* v. *Stubbs* (2), which was a case of illicit commissions.

Borthwick, for the defendant Miss Mouat.

Upjohn, Q.C., in reply, cited *Shee* v. *French*. (3)

Cur. adv. vult.

March 28. STIRLING J. (after stating the facts as above). A motion is now made that the defendant Mrs. Dalzell may

(1) (1832) 3 B. & Ad. 362. (2) (1890) 45 Ch. D. 1.
(3) (1857) 3 Drew. 716.

be ordered to pay the moneys into court, or that a receiver may be appointed. When the motion was brought on, the plaintiffs, by their counsel, offered to accept an undertaking by her not to receive the moneys due on the mortgages, or to deal with them until trial without notice; but Mrs. Dalzell insisted that there was no jurisdiction in the Court, under the circumstances of this case, to grant an injunction, or to appoint a receiver, and that is the point which I have had to consider.

Now it is quite clear that the Statute of Elizabeth confers legal rights and privileges—rights which are capable of being enforced at law, and which have been so enforced in reported cases. The effect of the statute appears to be this: that, as against creditors, an assignment which is within the statute is void both at law and in equity; and the property which is the subject-matter of the assignment is to be treated as being the property of the testator at the time of his death. On that I refer to *Bethell* v. *Stanhope* (1) and *Shears* v. *Rogers*. (2) In *Shears* v. *Rogers* (2) Littledale J. says that the creditors "had a right to the property which the deed purported to convey, and might enforce that right at law. The assignment was void as soon as the creditors claimed to treat it as such though not until then." And Patteson J. points out that the assignee becomes, by intermeddling with the property after the death of the assignor, an executor de son tort and chargeable by the creditors in respect of the property taken by him under the assignment. This view was approved of by Kindersley V.-C. in *Shee* v. *French*. (3)

But the rights of creditors, though they are legal, can be made available in courts of equity. There are many cases in which the Court of Chancery, prior to the Judicature Act, assisted the creditors by giving equitable remedies which are not available in courts of law. For example, there are many instances in which the Court has, after the death of the debtor, set aside deeds which were void under the statute, and proceeded to administer, for the benefit of creditors, the property which was the subject-matter of those deeds. Examples are

(1) (1599) Cro. Eliz. 810. (2) 3 B. & Ad. 362, 370.
(3) 3 Drew. 716.

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In truth, the Court appears to have pursued the same course with reference to property which constitutes assets of this description as it has with regard to other legal assets, as, for example, lands or real estate descended or devised in cases where specialty creditors had a right, either at law or under the statute, to payment out of such assets. In those cases the Court has proceeded, although the rights were legal, to administer the assets by directing a sale of so much of the land as was necessary to satisfy the debts: see the whole subject discussed by Lord Cottenham in *Pimm* v. *Insall*. (3)

The question which arises here is whether there has been such a change in the nature of the asset as to prevent the Court from granting any relief before judgment. It is said—indeed, in argument it was not disputed—that the Court, if it found the fund existing in specie, might lay hands on it at the trial and apply it for the benefit of the creditors, and, further, that before trial, if the fund existed in specie, the Court might intervene so as to secure it for the benefit of creditors. But it is said that by investing the fund on mortgage the right of the Court to secure the property for the benefit of creditors is intercepted. Now, no doubt, assets of this kind, wherever they may be, could not be followed into the hands of a bonâ fide purchaser for value without notice. Whether we look on the assignee as an executor de son tort or dealing with it in her own right, the relation of bonâ fide purchaser for value without notice would prevent the property from being followed into the hands of such purchaser; but there has been no such alienation here. The property remains in the hands and under the control of the assignee, though not in the shape in which it originally was. I fail to see, on principle, why the jurisdiction of the Court to secure that fund for the benefit of creditors should be ousted. According to the law which has been laid down in the cases I have just cited, the assignments became void the moment the creditors claimed to treat them as such; and thereupon the property which was

(1) (1868) L. R. 6 Eq. 468. (2) (1876) 1 Ch. D. 636.
(3) (1848) 1 Mac. & G. 449.

comprised in those assignments ceased, as against the creditors, to be the property of the assignee, and became assets for the payment of the creditors in such a way that they had a legal right to be paid out of those assets. Again, if the assignee is to be regarded as an executor de son tort, we have here the legal personal representative as a party to the suit, and I apprehend that assets in the hands of an executor de son tort might in a properly constituted suit be secured for the benefit of the creditors until the question was determined.

The only authority which was cited in opposition to this view was the case of *Lister & Co.* v. *Stubbs* (1); but the basis of that decision was that until judgment was given the money which had come to the hands of the defendant could not be treated as the money of the plaintiff. This seems to me to be a totally different case. According to the law as stated by Littledale J. in the passage I have pointed out, the assignments became void when the plaintiffs asserted their claim; and thereupon there arose, and at the present time there exists, a legal title on the part of the plaintiffs to have their debts satisfied out of the fund subsisting. It seems to me, therefore, that in this case there is jurisdiction to secure the fund for the benefit of the creditors. [The learned judge then dealt with an objection raised by counsel for Mrs. Dalzell that the plaintiffs had lost their rights by acquiescence and delay, and overruled it, and he continued as follows:—]

On the whole it seems that the Court may properly in this case intervene to the extent of saying that the defendant Mrs. Dalzell ought not to be allowed either to receive the mortgage moneys, so far as they represented the policy moneys, or to part with the mortgages except after notice to the plaintiffs and with the sanction of the Court.

Solicitors: *Collyer-Bristow & Co.; Oldman, Clabburn & Co.*

(1) 45 Ch. D. 1.

H. B. H.

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Feb. 15, 16, 21, 22; *April* 19.

BOOSEY *v.* WHIGHT.

[1898 B. 4658.]

Copyright — Music — Infringement — "Sheet of Music" — Perforated Roll of Paper for Use in Mechanical Organ — Copyright Act, 1842 (5 & 6 *Vict.* c. 45), *ss.* 2, 15.

The defendants sold for use in a mechanical wind instrument called an "Æolian" perforated rolls of paper which represented the instrumental music of certain songs in the music of which the plaintiffs had the copyright. The rolls were inserted in the instrument, and were unrolled by its action, and the passage of air through the slots in the rolls into the pipes of the instrument produced musical sounds the pitch and duration of which were determined by the position and length of the slots. The instrument also contained stops, swells, and pedals, whereby variations of time and expression could be effected at the will of the performer; and in the margin of some of the rolls there appeared directions as to time and expression which were also to be found in the plaintiffs' songs:—

Held, that the paper rolls, so far as they contained perforations, were part of the instrument, and were not sheets of music within the Copyright Act, 1842; but *held*, that the addition of the directions as to time and expression was an infringement of the plaintiffs' copyright.

THIS was the trial of an action by Messrs. Boosey & Co., who were the proprietors of the copyright in the words and music of three songs known as "My Lady's Bower," "The Better Land," and "The Holy City," for an injunction to restrain the defendants, their servants and agents, from infringing the copyright of the music in the songs in question, and for delivery to the plaintiffs of all copies of the said songs, an account of profits, and damages.

The alleged infringement consisted in the sale by the defendants of perforated sheets of paper for use in an instrument called the "Æolian," which externally bore a considerable resemblance to a piano, but was a wind instrument worked mechanically, but furnished with stops, swells, and pedals, by means of which changes in time and expression were effected. It contained forty-six pipes and reeds, each of which sounded a particular note. These sheets were made in the form of rolls, and when placed in the instrument were unrolled by its action. They were so prepared that whenever a perforation passed

under a particular pipe and reed the appropriate note was sounded. The perforations were made in straight lines parallel to the edges of the rolls, so that all perforations in the same line gave the same note. The perforations were of different lengths, so that if the same time was kept, as would be the case if the machine was left to itself, the length of the perforation indicated the duration of the note. At the beginning of each roll was printed a statement as to the key in which the piece of music was written, the object of this being to enable a person desirous of so doing to obtain the vocal music to which the instrumental music was an accompaniment. The rolls contained no indications of any change of key which might occur. There were, however, printed on some of them, though not on all, certain words which were found in the sheets of music published by the plaintiffs, such as andante, moderato, piano, crescendo, indicating the pace and expression at and with which the music ought to be played. These words were visible to the player, and were intended for his guidance. If one of these rolls were introduced into the instrument, the music would in ordinary course be produced at the same pace and with the same degree of loudness; these were altered by the use of the stops; and the skill of the player mainly consisted in availing himself of these aids so as to produce the best effect.

The evidence was principally directed to the question how far these perforated sheets could be read as music, as to which there was some difference of opinion. The result of the evidence is sufficiently stated in the judgment.

Butcher, Q.C., and *Scrutton*, for the plaintiffs. The perforated sheets of which the plaintiffs complain as infringing their copyright are sheets of music within the Copyright Act, 1842. They are not the less records of music because the music is recorded by means of perforations instead of by the ordinary notation. The notes of the music can be written out in the ordinary notation from the perforations. The material sections of the Act are ss. 2 and 15. By s. 2 "book" includes a sheet of music, and "copyright" is defined as "the sole and

STIRLING J. exclusive liberty of printing and otherwise multiplying copies" of anything which by the Act is the subject-matter of copyright. Sect. 15, which provides a remedy for infringement of copyright in terms refers to printing only, but it does not limit the operation of s. 2. Thus copies may be multiplied by lithography: *Novello* v. *Sudlow* (1); by typewriting, *Warne & Co.* v. *Seebohm* (2); by shorthand, *Nicols* v. *Pitman* (3); and, it is submitted, by the system of notation employed for the blind.

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The symbols matter little in themselves; the question in each case is whether the defendants are multiplying copies: *Bach* v. *Longman* (4); *D'Almaine* v. *Boosey*. (5) It may be said that these sheets of music are intended as parts of a machine, as in *Hollinrake* v. *Truswell* (6); but it is not necessary that the copy should be primarily intended to be used for the same purpose as the original, if it is capable of being so used: *Nicols* v. *Pitman*. (7) That case shews, also, that multiplying a copy cannot be restricted to something which any uninstructed person would recognise as a facsimile. It would be a curious anomaly in the Act if the defendants could be restrained, as we submit they could, by s. 20 from performing the protected music and could, nevertheless, manufacture and sell these records of the music. The object of the Legislature was to prevent one man from appropriating another's labour without paying for it, and the Act will be so construed as to promote fair and honest dealing between man and man: *Maple & Co.* v. *Junior Army and Navy Stores*. (8)

Moulton, Q.C., Edward Cutler, Q.C., T. Terrell, Q.C., and *Eustace Smith*, for the defendants. It is said that the intention of the Legislature was that no one should use another man's labour without paying for it, and that as the defendants have taken these musical compositions they must pay tribute; but that does not follow: *Hanfstaengl* v. *Empire Palace* (9); *Dicks* v. *Brooks* (10); *Davis* v. *Comitti* (11); *Hollinrake* v.

(1) (1852) 12 C. B. 177.
(2) (1888) 39 Ch. D. 73.
(3) (1884) 26 Ch. D. 374.
(4) (1777) 2 Cowp. 623.
(5) (1835) 1 Y. & C. Ex. 288.
(6) [1894] 3 Ch. 420.
(7) 26 Ch. D. 374, 382.
(8) (1882) 21 Ch. D. 369, 378.
(9) [1894] 2 Ch. 1.
(10) (1880) 15 Ch. D. 22.
(11) (1885) 54 L. J. (Ch.) 419.

Truswell (1); and see *Scott* v. *Stanford*. (2) The question is not whether the defendants have used the plaintiffs' work, but whether they have used it in such a way as that they must pay tribute. The Act must be construed without any preconceived notion that it must have been intended to extend over such and such a field. The intention of the Legislature can be inferred only from the language used, taken, no doubt, in connection with the surrounding circumstances. There is no connection between performance and the reproduction of copies. This case is wholly outside the Act of 1842. The Legislature did not intend to deal with the mechanical reproduction of the music, and the language of the Copyright Act of 1882 is at least as inappropriate to mechanical music as the language of the earlier Act. There is no distinction between the barrel of a musical-box or hurdy-gurdy and this flexible guide to the notes. Whenever you have a mechanical method of producing music, there must be some mechanical record by means of which it is produced. Beyond that, given any such record, any one having a knowledge of the machine in which the record is intended to be used can always invert the process and decipher what the music is which the record will cause to be produced. These two propositions are true of every mechanical method of producing music. They are certainly true of a musical-box or a barrel-organ. The record is in every such case only meant for causation. These rolls are not intended to be used and read as records of symbols. It may be that if you have a record which is intended to be read, and is capable of being read as music, and at the same time can be used for mechanical production, that would be an infringement. But this is only another form of mechanical reproduction of music. The rolls are intended merely for causation and not for indication of the music. It cannot be successfully contended that the Legislature intended to include in the words "sheet of music" the barrel of a musical-box or barrel-organ. The case of the mechanical reproduction of music was deliberately omitted from the operation of the statute, it may be for the reason that composers would possibly

(1) [1894] 3 Ch. 420. (2) (1867) L. R. 3 Eq. 718.

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be benefited by the mechanical reproduction of their works. An ordinary sheet of music contains conventional symbols which appeal to an intelligence. These rolls are strictly part of a machine, and cannot be brought within the scope of the Copyright Acts. The Legislature only meant to include what at the date of the Act of 1842 was known as a sheet of music.

With reference to the marks of expression, they are not material. They are merely directions to the player how to manipulate the machine. The mere addition of the marks of expression to that which is not in its essence a sheet of music is not sufficient to bring it within the operation of the Act. From 1842 down to the present time no attempt has been made by the owners of copyright to interfere with the automatic or mechanical reproduction of music.

Butcher, Q.C., in reply. The ordinary and normal use of a sheet of music is for the purpose of a record by means of which, coupled with human or mechanical agency, the music can be reproduced. These rolls constitute such records. It is immaterial whether the agency which intervenes between the symbols and the sound is human or mechanical. The express exclusion of mechanical music from the operation of the Berne Convention leads to the inference that such music would be included in the Copyright Acts in the absence of an express provision to the contrary. The protection of the Act of 1842 extends to every record which is capable of being translated into sound; it is not necessary that it should appeal directly to the human intelligence. But, assuming that to be necessary, that requirement is fulfilled here by the existence in these rolls of the directions as to time and expressions. Those words form part of the copyright in the music of the songs.

Cur. adv. vult.

April 19. STIRLING J. This is an action by the proprietors of the copyright in the music of three songs, known as "My Lady's Bower," "The Better Land," and "The Holy City," to restrain an alleged infringement. No question is raised as to the plaintiffs' title to the copyright, or to their right to sue for infringement. The sole question in the action is whether

the copyright has or has not been infringed. [His Lordship stated the facts as above, and continued as follows :—]

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It was admitted by the defendants' counsel that it is quite possible to prepare a key by which the notes corresponding to the perforations can be copied down, and, in fact, such a key has been prepared and applied to one of the pieces of music in question. No witness was called who professed to be able to read these rolls in the same way as an ordinary sheet of music, and, indeed, all that is said by Mr. Boosey, one of the plaintiffs, was that "any person acquainted with the perforation of the sheets sold by the defendants could write out the music in the ordinary notation therefrom." The defendants' witnesses said that these rolls conveyed no idea of music to them; but they were accustomed to the ordinary notation, and all, or most of them, admitted on cross-examination that they must say the same thing of music written in the tonic-sol-fa notation, or in that used by the blind. I think it is possible that, with considerable trouble, a person might so far master the scheme according to which the perforations are made as to be able to read the notes thereby denoted, but this is not shewn in any case to have been done. The result of the evidence appears to me to be that, if a person did qualify himself to read these rolls, the information thereby conveyed to the mind of the reader would, to a substantial degree, be the same as that afforded by a sheet of music in the ordinary notation, but would be in various ways less complete. It also appears to me that for this purpose the rolls constitute an extremely cumbrous system of writing music, hardly available without the use of some mechanism which at present does not exist. Upon the whole, I think it is highly improbable that any one would ever go to the trouble of acquiring the art of reading these rolls.

No question arises as to the right of performance of these pieces under s. 20 of the Copyright Act of 1842. What is in dispute is, whether the sale of these rolls constitutes an infringement of the copyright vested in the plaintiffs under the earlier part of the Act. This turns on the construction of s. 2, by which the word "book" is to be construed to mean and

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include (amongst other things) every sheet of music separately published, and the word "copyright" is to be construed to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is applied in the Act, including, therefore, a sheet of music. The contention of the plaintiffs is that the rolls are copies of a substantial part of what is found in the sheets published by them, though expressed in a somewhat unusual and difficult form of notation, and consequently that the sole and exclusive liberty of multiplying copies is infringed, just as the publication in shorthand of an ordinary piece of letterpress would be an infringement of the copyright therein: see *Nicols* v. *Pitman*. (1) For the defendants it is urged that the rolls really form parts of machines for the production of musical sounds, and that the Legislature in passing the Copyright Act shewed no intention of interfering with such mechanism. In my opinion the latter view is in the main to be preferred. It was decided in *Bach* v. *Longman* (2) that the copyright conferred by the statute 8 Anne, c. 19, on the authors of printed books extended to printed music. This decision has been embodied in s. 2 of the Act of 1842, as quoted above. The copyright conferred by that Act appears to me to be the exclusive liberty of multiplying copies of something in the nature of a book. The rolls, so far as they contain perforations, are, in fact, used simply as parts of a machine for the production of musical sounds, not for the purpose of a book. They are used as a means of appealing to the mind directly through the ear; not, as in the case of a book, through the eye of an ordinary reader, or through the sense of touch in the case of a blind person. Some mechanical instruments for the production of musical effects, as, for example, the musical-box and the barrel-organ, seem to have been well known in the last century, long prior to the passing of the Act of 1842. It was admitted by Mr. Scrutton in his able argument for the plaintiffs that, if the construction sought to be placed by them on the Act be sound, the cylinder of a musical-box is a sheet of music within the statute. If this had been within the contemplation of the

(1) 26 Ch. D. 374. (2) 2 Cowp. 623.

Legislature, I cannot but think that the framers of the Act, who were careful to point out what the word "book" was to mean and include, would have been no less careful to explain that the term "sheet of music" was to mean and include something which would not fall within the ordinary acceptation of the words.

There is no decision in this country precisely in point. In *Hollinrake* v. *Truswell* (1) it was held that a cardboard pattern sleeve, containing on it scales, figures, and verbal directions for adapting it to sleeves of any dimensions, was an instrument or tool incapable of copyright under the Act of 1842, though possibly the subject-matter of a patent. In the statutes relating to copyright in paintings and engravings, limitations of various kinds have been placed on the meaning of the word "copy": see *Dicks* v. *Brooks* (2); *Hanfstaengl* v. *Empire Palace* (3); and *Hanfstaengl* v. *Baines & Co.* (4)

In my judgment the Act of 1842, fairly construed, does not prevent the defendants from making or selling these rolls, so far as they contain perforations. I think, however, that in adding to them words taken from the plaintiffs' music sheets, for the purpose of indicating to the player on the instrument the pace and expression at and with which the music ought to be played, the defendants have gone beyond their rights, and that there ought to be an injunction to restrain them from so doing. Under all the circumstances I propose to make no order as to costs.

Solicitors: *Wilkinson, Howlett & Wilkinson; Maples, Teesdale & Co.*

(1) [1894] 3 Ch. 420.
(2) 15 Ch. D. 22.
(3) [1894] 2 Ch. 1.
(4) [1895] A. C. 20.

H. B. H.

STIRLING J. NICHOLL *v.* URBAN DISTRICT COUNCIL OF EPPING.

1899

April 18, 19, 28.

[1899 N. 259.]

Local Government — Privies and Water-closets — Local Authority — Powers — Substitution of Water-closet for Privy — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

By s. 36 of the Public Health Act, 1875, if a house within the district of a local authority appears to such authority, by the report of their inspector of nuisances, "to be without a sufficient water-closet, earth-closet or privy, and an ashpit furnished with proper doors and coverings," the local authority are directed to give notice to the owner or occupier of the house requiring him "to provide a sufficient water-closet, earth-closet or privy, and an ashpit furnished as aforesaid, or either of them, as the case may require":—

Held, that a local authority had power under this section, upon being satisfied that a house within their district was without a sufficient privy, to require the owner (subject to his right to appeal to the Local Government Board under s. 268) to provide a sufficient water-closet in the place of the existing privy.

THE plaintiff was the owner of four cottages situate within the district of the defendant council, which were rented at sums varying from 3*l.* 15*s.* to 4*l.* a year. Each of these cottages had a privy attached to it.

This was a motion by the plaintiff for an injunction to restrain the defendants from entering upon any of the plaintiff's said messuages and premises, and from converting the privies attached to the said messuages or any of them into water-closets, and from otherwise interfering with the said messuages or premises or any of them. On May 25, 1898, the district inspector made a report to the defendant council as to each of these cottages. The reports were all in the same form. One of the reports was as follows: "To the Urban District Council for the urban district of Epping, in the county of Essex. Gentlemen,—In pursuance of sect. 36 of the Public Health Act, 1875, I have the honour to report to you that on the 18th day of May, 1898, I examined the house occupied by Joseph

Sells in Hemnal Street, within the said district, and found that the said house was without a sufficient water-closet, earth-closet, or privy. I therefore recommend that notice be forthwith given to the owner of the said house requiring him, within the space of six weeks, to provide for the said house a sufficient water-closet."

It appeared from the evidence that each of the cottages was considered separately by the inspector, and that in respect of each he came to the conclusion that the existing accommodation was insufficient, and ought to be replaced by a sufficient water-closet. On the same day each report was read at a meeting of the defendant council, and the inspector was present, and was consulted as to each report. On August 19, 1898, the defendant council caused notices to be served upon plaintiff in the following form: "To Mr. John Nicholl, of Epping, the owner of the house occupied by Joseph Sells, in Hemnal Street, in the urban district of Epping.—Take notice, that the urban district council of Epping, in the county of Essex, being satisfied, on the report of their inspector of nuisances, dated the 25th day of May, 1898, that the house above described is without a sufficient water-closet and earth-closet or privy, hereby require you, in pursuance of the provisions of the Public Health Act, 1875, to provide for the said house, within the space of six weeks from the service upon you of this notice, a sufficient water-closet. If the above notice is not complied with within the time aforesaid, the urban district council of Epping may, at the expiration of such time, do the work required to be done, and recover the expenses incurred in so doing in the manner provided by the said Act."

The plaintiff not having complied with these notices within the prescribed time, the defendants proceeded, in exercise, as they alleged, of their statutory powers, to execute the works required to be done by the notices. This action was brought to restrain them from so doing.

Upjohn, Q.C., and *P. S. Stokes*, for the plaintiff. The defendants have no authority under s. 36 of the Public Health Act, 1875, to require the plaintiff to provide water-closets in

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place of the existing privies (1): *Wood* v. *Widnes Corporation* (2); *Barnett* v. *Laskey*. (3) In *Tinkler* v. *Wandsworth District Board of Works* (4), which was decided under a very similar provision in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 81, Knight Bruce L.J. expressed a strong opinion against the claim of the local authority to substitute water-closets for privies, as being an undue interference with the rights of property. *St. Luke's Vestry* v. *Lewis* (5), which was also a decision under s. 81, may be relied on by the defendants; but the Court of Queen's Bench in that case based their decision upon a part of the section which differed in its language from the section now under consideration, and was more favourable to the claim of the local authority.

That the erection of privies is permissible under the Public Health Act, 1875, is clear from ss. 35–42 and s. 44.

Macmorran, Q.C., and *Parkyn*, for the defendants. When once the local authority have determined that the existing accommodation is insufficient, then they have power to prescribe what is to be substituted for it, subject to the right of any person who deems himself aggrieved by the decision of the local authority to appeal to the Local Government Board

(1) The material provisions of the Public Health Act, 1875, are as follows:—

Sect. 35: "It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground-floor, without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings. . . ."

Sect. 36: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require.

"If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing. . . ."

(2) [1897] 2 Q. B. 357; [1898] 1 Q. B. 463.

(3) (1898) 68 L. J. (Q.B.) 55.

(4) (1858) 2 De G. & J. 261.

(5) (1862) 1 B. & S. 865.

under s. 268 of the Public Health Act, 1875. The plaintiff ought to have taken that course in the present case. We admit that if the defendants were acting in pursuance of a general scheme to introduce water-closets in place of privies they would be wrong; but there is no evidence in this case of any such general scheme. It is for the local authority to determine in each particular case what shall be provided. The language of ss. 35 and 36 is practically the same as that used in s. 81 of the Metropolis Management Act, 1855. *St. Luke's Vestry* v. *Lewis* (1) was decided upon the latter section, and is an express authority in favour of the defendants upon the point now before the Court. In *Wood* v. *Widnes Corporation* (2) it was not disputed in the Divisional Court (3) that the local authority had power to order the substitution of a water-closet for a privy; the complaint was that the authority there sought to lay down a general rule requiring the adoption of a particular closet system in all future cases. No doubt the statute allows the erection of privies; but when a privy becomes insufficient the local authority can require the owner to substitute a water-closet. It is entirely for the local authority to determine what is to be erected in the place of accommodation which has been pronounced insufficient.

[They also referred to *Whitaker* v. *Derby Urban Sanitary Authority* (4) and *Robinson* v. *Sunderland Corporation*. (5)]

Upjohn, Q.C., in reply.

Cur. adv. vult.

April 28. STIRLING J. (after stating the facts as above). It is admitted that the plaintiff cannot in this Court impeach the reports of the inspector, and that if he has any ground of complaint in respect of those reports he must appeal to the Local Government Board under s. 268 of the Public Health Act, 1875. Upon the motion being heard, two objections to the proceedings of the defendants were raised. It was said, first, that the local authority was acting in pursuance of a general

(1) 1 B. & S. 865.
(2) [1897] 2 Q. B. 357; [1898] 1 Q. B. 463.
(3) [1897] 2 Q. B. 360.
(4) (1886) 55 L. J. (M.C.) 8.
(5) (1898) 78 L. T. 194.

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scheme without exercising a discretion as to the exigencies of each particular case, as is required by the statute. This, however, was not made out, and the plaintiff did not insist upon it in reply. The second objection—and that chiefly relied on by the plaintiff—is this: that the defendants have no authority to require the plaintiff to provide a sufficient water-closet in place of a privy. That turns upon the construction of s. 36 of the Public Health Act, 1875; but, in order to understand the question, I propose first to refer to s. 35. [His Lordship read ss. 35 and 36.] There are other sections in the Act to which I need not refer, which shew that the Act recognizes that accommodation may be provided in the shape of privies. It is clear that the Legislature has not prohibited the erection of privies. The question is whether a local authority, having found an existing privy to be insufficient, may require the owner to provide a sufficient water-closet, subject, of course, to a right of appeal to the Local Government Board similar to that which admittedly exists as to the sufficiency of the existing accommodation. The material words are, "or either of them, as the case may require." It is said on behalf of the plaintiff that these words relate simply to "privy and ashpit." The contention on behalf of the defendants is that they relate to the three classes of accommodation dealt with by the clause, "water-closet, earth-closet or privy, and ashpit." Looking at the language of the Act, it seems to me as a matter of construction that the words "or either of them, as the case may require," have not the narrow meaning contended for by the plaintiff. It has, however, been contended, upon grounds which I will examine presently, that I ought not to act upon what appears to me to be the natural meaning of the section; but before dealing with that contention I will refer to the authorities. There is no decision precisely in point. The section was considered by the Court of Appeal in *Wood* v. *Widnes Corporation* (1), but the point there determined was not that which I have now to consider. In that case the local authority was not content to limit the notice to providing a sufficient water-closet, but required the owner to provide a

(1) [1898] 1 Q. B. 463.

water-closet of a particular form, and it was held that they had exceeded their powers, and that the owner was entitled to provide accommodation of the kind required according to his own views so long as it was sufficient. That point is different from that with which I have now to deal, and the expressions of the Court of Appeal seem to me to be directed to that question, and not to the present one. Reference was, however, made to the Metropolis Management Act, 1855, s. 81, the provisions of which, though framed in slightly different language, are very similar to those of the Public Health Act, 1875. [His Lordship read the section.] The section begins with a clause similar to s. 35; then follow the provisions which correspond to those of s. 36. Now the words "or either of them as the case may require," in s. 81, are the same as the words in s. 36; but the language of the latter part of the section, which provides for the event of the notice not being complied with, is somewhat different. Instead of the words "the local authority may at the expiration of the time specified in the notice do the work thereby required to be done," the words in s. 81 are: "It shall be lawful for the vestry or district board to cause to be constructed a sufficient water-closet or privy and ashpit, or either of them, or do such other works as the case may require." That section has more than once been the subject of decision. The earliest authority upon it is *Tinkler* v. *Wandsworth District Board of Works* (1), where Knight Bruce L.J. expressed an opinion to the effect that the local authority in that case were not entitled under the Act to issue notices directing water-closets to be substituted for privies. The Lord Justice said (2): "The defendants claimed and claim that power"—i.e., the power of substituting water-closets for privies—"solely under the 120th and 121st chapters of the 18th and 19th of the Queen, often mentioned, and of necessity much discussed, during the argument, but especially the 81st and 85th sections of chapter 120. Remarkable as some of the provisions of that Act seem to me to be, I am of opinion that they do not deal with rights of property in such a way as the defendants contend that

(1) 2 De G. & J. 261. (2) 2 De G. & J. 270.

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they do, nor can I find in the two statutes or either of them any warrant for what the defendants have been attempting and now insist upon." Turner L.J. abstained from expressing any opinion on that point. He said (1): "Whether this conclusion is well founded and whether the powers given by this Act are such that no abuse of them could be committed that would warrant the interference of this Court, I do not intend to give any opinion whatever, for the defendants' argument plainly rests on the hypothesis that the case falls within the Act, and I am of opinion that this case does not fall within it." And he based his judgment upon the fact that the defendants were attempting to enforce a general scheme without exercising their discretion as to the circumstances of the particular case, which it is well settled they are not entitled to do. That decision, therefore, was rested on other grounds. But the precise point came before the Court of Queen's Bench, consisting of Cockburn C.J. and Wightman and Crompton JJ., in *St. Luke's Vestry* v. *Lewis*. (2) There the Court thought that the Act did confer the power contended for by the local authority. All the judges, however, rested their decision on the latter part of the section. They decided that the words "or either of them as the case may require" had the meaning contended for by the local authority, but, in arriving at that conclusion, they relied largely upon that portion of the section which differs in its language from the provisions of the Public Health Act, 1875. Cockburn C.J. says (3): "On the part of the vestry it is urged that they were right in holding that the privies attached to these houses were insufficient: while the contention of the respondent is, that although the vestry might have directed him to alter those privies so as to make them sufficient, they could not order water-closets to be put up in place of them. I do not see that such is the necessary effect of the language of the Act: quite the contrary. Power is given to the vestry, &c., to cause to be constructed a sufficient water-closet or privy, 'or either of them,' which last words

(1) 2 De G. & J. 272. (2) 1 B. & S. 865.
(3) 1 B. & S. 875.

seem very strong to shew that if the fact is once established that there is an insufficient privy, they are to have authority to order a water-closet or privy in the alternative." And then he goes on to give reasons why it is right and proper that such authority should be vested in the local board. The two other judges also relied on the words contained in the latter part of the section. Before me, what was relied on in argument as shewing that I ought not to act upon the view taken by the defendants was this—that to confer this power upon the local authority would be too large an interference with rights of property. That is the point taken by Knight Bruce L.J. in *Tinkler* v. *Wandsworth District Board of Works* (1), and his opinion is one which must be duly regarded. On the other hand, in the *St. Luke's Vestry* v. *Lewis* (2), Cockburn C.J. justifies such an interference on sanitary grounds, even though it is an interference with the rights of property. I may point out that, though the language of the Public Health Act, 1875, differs from that of the Metropolis Management Act, 1855, still, if, under s. 36 of the Public Health Act, the notice is made to follow the exact terms of the section, namely, "to provide a sufficient water-closet, earth-closet, or privy, and an ashpit furnished as aforesaid, or either of them as the case may require," the power which is given to the local authority is "to do the work thereby required to be done," and the discretion must ultimately come to be exercised by the local authority. It could not be said that they could not do the work in the way which they thought the circumstances of the case might require. It was objected that, on the defendants' view of the law, an owner, having provided accommodation in accordance with s. 35, might within a year or other short time be compelled under s. 36 to provide accommodation of a different kind. That, however, could only happen in two events: first, upon the local authority being satisfied that the existing accommodation was insufficient; and, secondly, upon it being shewn that the circumstances of the particular case required another kind of accommodation. On both points the owner would have a

(1) 2 De G. & J. 261. (2) 1 B. & S. 865.

STIRLING J. right of appeal. Upon the whole, although the enactment is not so clear as that in the Metropolis Management Act, 1855, I think that the language is sufficient to confer the power claimed by the defendants, that rights of property are sufficiently protected, and that the motion consequently fails.

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Solicitors: *Pownall & Co., for R. D. Trotter, Epping; Robbins, Billing & Co., for G. J. Creed, Epping.*

H. B. H.

In re RAPHAEL.
Ex parte SALOMON.

KEKEWICH J.

1899

Feb. 10, 11, 18.

Practice—Costs—House of Lords—Liability of Pauper Appellant—Solicitor and Client.

Where an impecunious person is allowed to appeal to the House of Lords in formâ pauperis, the rules of the Supreme Court not being applicable, and there being no rules or practice of the House prescribing the assignment of a solicitor to a pauper appellant, or regulating the liability of such appellant for costs as between him and his solicitor, the contract between the pauper appellant and his solicitor must be taken to be the ordinary one, so that from the moment of the retainer of the solicitor by him, so long as the retainer holds good, although he has no means to pay, he is liable to pay costs in the same way as any other impecunious litigant who employed a solicitor would be liable.

Dicta of Sir F. Jeune in *Richardson* v. *Richardson*, [1895] P. 276, affirmed on appeal, [1895] P. 346, adopted.

Adjourned Summons on taxation of costs.

The applicant Ralph Raphael was a solicitor and had acted in that capacity for the late Aron Salomon in the case of *Broderip* v. *Salomon* (1), and in the subsequent appeal of Aron Salomon to the House of Lords—*Salomon* v. *Salomon* (2)—in which the House reversed the decision of the Court of Appeal, and held that the company of A. Salomon & Co., Limited, was duly formed and registered and was not the mere "alias" or agent of or trustee for Aron Salomon, and that he was not liable to indemnify the company against the creditors' claims.

The effect of the judgment of the Court of Appeal had been to reduce Aron Salomon to poverty. Acting under the advice of the applicant, he resolved to appeal to the House of Lords, and presented a petition to the House for leave to sue in formâ pauperis, accompanied by the usual affidavit deposing that he was not worth more than 5*l.* in the world except his wearing apparel and the subject-matter of the appeal. The petition was entertained by the Appeal Committee, and an order was made that Aron Salomon "be allowed to prosecute his appeal in formâ pauperis."

(1) [1895] 2 Ch. 323. (2) [1897] A. C. 22.

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The effect of the reversal of the judgment of the Court of Appeal by the House of Lords was that Aron Salomon ceased to be a pauper. He died intestate in the year 1897, and the respondent Emanuel Salomon was duly appointed administrator of his estate and effects.

The applicant delivered to the respondent a bill of costs, a portion of which comprised items for work done by the applicant as solicitor for Aron Salomon in the prosecution of the appeal to the House of Lords. The bill was taxed on the petition of the respondent, and the taxing master to whom the taxation was referred (Master Alexander) submitted this portion of the bill to Mr. Taylor of the Taxing Department of the House of Lords. The bill was brought in and lodged, and, on the appointment to tax, it was contended on behalf of the respondent that, this being a taxation under an order of the Chancery Division, the solicitor was bound by rule 27 of Order XVI. of the Rules of the Supreme Court, and accordingly was precluded from obtaining "any fee profit or reward" for the conduct of the business. In the result Mr. Taylor declined to tax the bill, on the ground that he had no precedent or ruling to guide him, inasmuch as the Rules of the Supreme Court did not bind the House of Lords, and there did not exist any rules or practice of the House regulating the liability to costs as between solicitor and client in the case of a pauper appellant.

The items having been disallowed, the present summons was taken out to review the taxing master's certificate in this and in other respects. The summons was adjourned into court, and now came on to be heard, and the question was argued whether or not Aron Salomon, having been thus allowed to sue as a pauper, became liable, as between him and his solicitor, to pay costs for the conduct of the business done while he was so suing.

Kenyon Parker, in support of the summons. There being no practice in the House of Lords regulating the liability of a pauper to pay costs as between solicitor and client, and it being admitted that Order XVI., rr. 22–31, of the Rules of the Supreme Court have no application, the case must be governed by the

ordinary principles applicable where a solicitor does work for a client in the absence of any special stipulation. As regards the costs as between party and party of the proceedings in the House of Lords there is a special bargain, because the liability in that respect is regulated by the rules of the House of Lords and by the decision in *Johnson* v. *Lindsay & Co.* (1), where it was laid down that, on taxation of a pauper plaintiff's costs of a successful appeal, the fees of the House and the fees of counsel are to be disallowed, and the solicitor is to have his costs out of pocket with a reasonable allowance to cover office expenses, including clerks, &c. In *Richardson* v. *Richardson* (2) Sir F. Jeune intimated an opinion that a solicitor not assigned by the Court but employed by the pauper could, if he thought it worth while, sue his client on a retainer. (3) It is submitted that the taxation ought to be referred back to the taxing master with a direction that he should tax the costs as between solicitor and client in the ordinary way.

S. O. Buckmaster, for the respondent. The Court has simply to determine what is the meaning and effect of an order that a man should sue in formâ pauperis. There being nothing in the general orders of the House of Lords, or in their directions to agents, making any provision in respect of the status of a man suing as pauper, his status must, it is submitted, be the same in the House of Lords as in the High Court. In *Carson* v. *Pickersgill & Sons* (4) it was held that a successful plaintiff suing as a pauper in an action tried before a judge and jury was entitled upon taxation as against the defendant to costs out of pocket only, and could not be allowed anything for remuneration to his solicitor or fees to counsel. The costs which the Court of Appeal in that case held the pauper to be entitled to are exactly the costs which the House of Lords held the pauper was entitled to in *Johnson* v. *Lindsay & Co.* (1), and therefore the House of Lords has expressly adopted the practice of the High Court that a successful pauper cannot recover from an unsuccessful party such costs as would not be allowed in this

(1) [1892] A. C. 110.
(2) [1895] P. 276.
(3) See also *White* v. *White*, [1898] P. 124.
(4) (1885) 14 Q. B. D. 859.

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Court. If the argument of the other side prevails a successful pauper litigant will be in a worse position than any other litigant, because his solicitor will be able to recover the whole costs from him, and he himself will be unable to recover them from his unsuccessful opponents. The practice of allowing a person to sue in formâ pauperis is designed, not for the protection of the defendant (who is necessarily prejudiced if the plaintiff is impecunious), but in order to confer special rights on the pauper as between him and his solicitor. It is submitted that the words "in formâ pauperis" in the order of the House of Lords ought to have the same meaning as would be attached to them in the High Court.

Kenyon Parker, in reply.

Feb. 18. KEKEWICH J. A novel and interesting point on the important question of costs arises on this application. The order of Vaughan Williams J. and the Court of Appeal in the case of *Broderip* v. *Salomon* (1), known as the "one-man company" case, reduced Mr. Aron Salomon to poverty by depriving him of all he had in the world. He carried his case to the House of Lords, and by the affidavit which he made in support of his petition to the House for leave to sue in formâ pauperis, which was considered by the Appeal Committee, he swore that he was not worth more than 5*l.* in the world, except his wearing apparel and the subject-matter of the appeal. On that he was allowed to appeal in formâ pauperis. He succeeded in his appeal, and, though he was not thereby made a wealthy man, he was rehabilitated, and removed from the list of paupers. That being so, of course he was entitled as a successful appellant to certain costs from the unsuccessful respondents, and those costs were necessarily paid according to the rule laid down in *Johnson* v. *Lindsay & Co.* (2) Their Lordships there laid down the rule that on taxation of a pauper appellant's costs of a successful appeal, the fees of the House and the fees of counsel were to be disallowed, and the solicitor was to have his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, &c.

(1) [1895] 2 Ch. 323. (2) [1892] A. C. 110.

That is all that Mr. Aron Salomon was entitled to recover from the unsuccessful respondent. An order by the House of Lords on the respondent to pay the pauper appellant's costs would be construed to mean what I have stated. Then Mr. Aron Salomon's solicitor says that he is entitled to receive from Mr. Aron Salomon, or rather to have paid out of his estate, the ordinary costs which a solicitor is entitled to charge, that is to say, costs to be taxed as between solicitor and client, and the question I have to decide is whether he is so entitled. It is strange that there is no direct authority upon the point. The orders of the Supreme Court do not apply to cases in the House of Lords, and I cannot say that, because, if this had been an action in the High Court, Mr. Raphael would not have been entitled to costs, therefore he is not entitled to recover costs incurred in the House of Lords. On that *Johnson* v. *Lindsay & Co.* (1) does not help me in the least, and I do not think I can pay any attention to the allegations in the petition set out in the report of that case. If I could take those as true, they would dispose of this case. "It was urged on behalf of the petitioners that in the case of a pauper appellant in this House the fees of the House are not required from him and he obtains the services of counsel and solicitor without remuneration; that if the appeal is dismissed no costs are given against him; and that if when the appeal is successful the appellant's costs are allowed and are taxed upon the principle hitherto in force in the House the respondent has to pay when he loses and not be paid when he wins, and moreover has to pay the appellant's costs—not of suing as a pauper but of winning as a pauper." It is strange that there is there a statement not only that the fees of the House are not charged, but that the pauper obtains the services of solicitor and counsel without remuneration. If that had been true, it would dispose of this case. But the allegation in the petition is controverted, and I find no proof of it anywhere. For the same or a like reason I cannot find much to guide me in the otherwise instructive case of *Carson* v. *Pickersgill & Sons* (2), because that is a decision respecting the rules of the Supreme Court. It was

(1) [1892] A. C. 110. (2) 14 Q. B. D. 859.

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there held that under Order XVI., rr. 24–27, a successful plaintiff in an action in formâ pauperis tried before a judge and jury is entitled upon taxation as against the defendants to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. The fact there that it was tried by a jury, so that the costs were not in the discretion of the Court, was much discussed. But in truth that decision went entirely on the rules, which were very carefully considered and criticised by more than one learned judge, and does not touch the general principle. But the rules seem to me to be based upon this—that when a man sues in formâ pauperis in the Supreme Court he has a solicitor and counsel assigned to him, and that makes all the difference. They are assigned to him on certain terms, which bind them as much as they bind him. So here I am left without authority and have to decide the matter on general principle. What is the contract? That, on reflection, seems to me to be the real question. What was the contract between Aron Salomon and his solicitor, Raphael, when Raphael accepted the client's retainer to conduct the appeal in the House of Lords? Am I to invent a special contract resting entirely on the fact that the client was suing as a pauper—a contract which substantially would say this, that whereas, but for special contract, the retainer would enable the solicitor to charge the client in the ordinary way, that is to say, to charge costs including profit costs, subject to taxation, yet because he is suing as a pauper, the client is not to be liable in that or any other manner, but only according to a special contract depending on the fact that he sues as a pauper? Why should I invent that contract for the occasion? Here is a man who acts, not as the assigned solicitor of Aron Salomon, but as the solicitor of Aron Salomon's own choice. Why should I not say that his retainer is governed by the ordinary rules? I have said that there is no authority on the point, but there is a very useful case before Sir Francis Jeune in which he expressed an opinion, subject, no doubt, to revision if the actual point ever came before him: *Richardson* v. *Richardson*. (1) There there was a suit in the Divorce Court.

(1) [1895] P. 276; affirmed by C. A. [1895] P. 346.

The petitioner, suing in formâ pauperis, obtained a verdict for 30*l.* damages, and a decree nisi with costs against the co-respondent, and the question there was (as it was in *Johnson* v. *Lindsay & Co.* (1)), not what the solicitor was to obtain from the pauper client, but what the co-respondent was to pay to the pauper petitioner. It was argued, not at great length, but some authorities were cited, and Sir F. Jeune reserved his judgment, and subsequently delivered a very instructive judgment, in which he called attention more than once to the difference between the assignment of a solicitor to a pauper and the retainer of a solicitor by him, and he says (2): "It follows, I think, that there is nothing to prevent counsel or a solicitor being retained by a pauper and receiving from him such fees as he, perhaps by the aid of friends, may be able to pay, and this is the effect of the opinion given by the Attorney-General (Sir Richard Webster) in 1890: see the *Law Times*, vol. xc., p. 79. Whether a solicitor not assigned by the Court, but employed by the pauper, could, if he thought it worth while, sue his client on a retainer, it is not necessary to decide; but my present opinion is that he could." Of course, that opinion is not binding upon me, and it is not really a judicial decision, but it is valuable as being the opinion of the learned judge, not on the particular point before him, but on one connected with a point which involved a large discussion on costs where a man sues in formâ pauperis. That view seems to me to be consonant with justice and common sense. We may trust solicitors in general when they accept a retainer from a pauper not to sue him on the retainer. If a sense of honour would not prevent them from suing and recovering judgment, their own interest would, because if they have got a pauper to deal with it is not likely they would be willing to spend money in recovering judgment against him. But does that prevent the client from employing the solicitor on the footing that the solicitor may make the client pay if he becomes able to do so? I wish it to be perfectly understood that I am not suggesting that the contract between the pauper and his solicitor is that he should not pay unless he succeeds—I do

(1) [1892] A. C. 110. (2) [1895] P. 278.

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not think that would be a proper contract to infer—or that he will pay the expenses if fortunately he ever has the means so to do, or, as it is expressed in an old book referred to by Sir Francis Jeune, "cum ad uberiores fortunas pervenerit." I do not think that the contract is of that character. The contract is the ordinary one, namely, that the client from the moment of the retainer, so long as the retainer holds good, is bound to pay the costs, although he has not in fact the means to pay. That is in accordance with the ordinary practice. Solicitors often accept retainers for persons who, to their knowledge, are not able to pay, and they do so partly out of kindness and partly because they are content to take the rough with the smooth in the course of business. Because a solicitor happens to know that his client is impecunious, it would be very hard that it should be said that he could not sue his client for his costs if he thought fit to do so; and I do not see, for this purpose, the distinction between the man who is known to be impecunious, though not described in the procedure as such, and the man who is suing in formâ pauperis because he has been allowed to do so by the House of Lords.

Accordingly, I must hold that the solicitor is entitled to his costs, as between solicitor and client, of the appeal to the House of Lords, and the matter must be referred to the taxing master for taxation on that footing.

Solicitors: *Ralph Raphael & Co.; Harris & Chetham.*

C. C. M. D.

TIESSEN *v.* HENDERSON.

KEKEWICH J.

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March 28; *April* 11.

[1899 T. 395.]

Company—Shareholder—General Meeting—Notice—Irregularity—Special Resolutions—Directors' Interest—Non-disclosure—Conditional Notice.

The notice of an extraordinary general meeting must disclose all facts necessary to enable the shareholder receiving it to determine in his own interest whether or not he ought to attend the meeting; and pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose.

Kaye v. *Croydon Tramways Co.*, [1898] 1 Ch. 358, followed.

A notice of two meetings to be held in immediate succession to consider seriatim two alternative resolutions, one at each meeting, is not rendered an invalid notice of the second meeting by an express provision that it will only be held in the event of the first resolution not being passed at the first meeting.

Alexander v. *Simpson*, (1889) 43 Ch. D. 139, distinguished.

MOTION.

This was a motion by the plaintiffs, on behalf of themselves and all other holders of shares in the Violet Consolidated Gold Mining Company, Limited, for an injunction to restrain the company, three of its directors, and its ostensible liquidator until the hearing of the action or further order from acting upon or carrying into effect certain special resolutions for reconstruction alleged to have been passed and confirmed at extraordinary general meetings held on February 16, 1899, and March 3, 1899, respectively.

The notice for the first meeting was dated February 7, 1899. It stated that the meeting would be held at noon, February 16, for the purpose of considering, and if thought fit passing, the following resolutions, namely:—

"(1.) That it is desirable to reconstruct the company, and accordingly that the company be wound up voluntarily, and that George Fowler Neall (Secretary) be, and he is hereby appointed liquidator for the purposes of such winding-up.

"(2.) That the said liquidator be, and he is authorized to consent to the registration of a new company, to be named the 'Violet Consolidated Gold Mining Company, Limited,' having

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a capital of 500,000*l.*, divided into 500,000 shares of 1*l.* each, subject to such memorandum and articles of association as may be agreed upon by such liquidator.

"(3.) That the draft agreement submitted to this meeting, and expressed to be made between the company and its liquidator of the one part, and the Violet Consolidated Gold Mining Company, Limited, of the other part, be, and the same is hereby approved, and that the said liquidator be, and he is hereby authorized, pursuant to s. 161 of the Companies Act, 1862, to enter into an agreement with such new company (when incorporated) in the terms of the said draft, and to carry the same into effect with such (if any) modifications as he may deem expedient."

"Should the above resolutions be passed by the requisite majority, they will be submitted for confirmation as special resolutions to a second extraordinary general meeting, which will be subsequently convened."

The circular of the same date stated the plan of the scheme suggested for reconstruction, hereinafter called the Henderson scheme, as follows:—

"A new company to be formed having a capital of 500,000*l.*

"Of this each shareholder will receive

one share for every four shares held by him in the present company .	150,000 shares.
Shares set aside for conversion of debentures	150,000 ,,
Shares under call.	100,000 ,,
And kept in reserve	100,000 ,,
	£500,000"

The circular also stated that debentures would be issued for 150,000*l.* and offered to the shareholders for subscription pro ratâ to their holding in the present company, that further applications by the shareholders would receive prior consideration, and that the debentures might be exchanged for shares during a period of three years. The circular concluded as follows:—

"A call on shares is reserved as to 50,000 for the managers

and issuing company, and as to the remaining 50,000 for the guarantors, which has to be exercised at par within three years from the date of the formation of the new company. It is proposed to entrust the management of the company in South Africa to the Consolidated Gold Fields of South Africa, Limited, upon terms which will be agreed upon. It is also proposed that the board of the company should consist of Messrs. Henderson, Richards, Schlesinger and Van Ryn and the Hon. Chandos Stanhope, as representing the Consolidated Gold Fields.

"The full issue of debentures has been guaranteed by the Henderson's Transvaal Estates, Limited, so as to secure the necessary amount for paying off the mortgage and for carrying on the work of the company.

"Proxies are sent herewith which should be lodged with the company not later than Monday, February 13, 1899."

The meeting was held on February 16, and the resolutions passed by the requisite majority.

On February 20 an alternative scheme, hereinafter called the General Finance scheme, which had been informally mentioned at the previous meeting, was formally submitted to the directors by the General Mining and Finance Corporation, Limited.

On February 23 the directors, wishing to place the alternative schemes before the company in immediate succession, issued a notice stating that the General Mining and Finance Corporation, Limited, had submitted a proposal to the company for the reconstruction of the company, and giving notice of an extraordinary general meeting to be held at noon, March 3, for the purpose of considering, and if thought fit passing, resolutions embodying the General Finance scheme. After setting out the resolutions the notice proceeded:—

"These resolutions will be in reference to the scheme of the General Mining and Finance Corporation, Limited.

"Should the above resolutions be passed by the requisite majority, they will be submitted for confirmation as special resolutions to a second extraordinary general meeting, which will be subsequently convened.

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"In the event of such resolutions not being passed, immediately after such meeting, an extraordinary general meeting of the company will be held, when the following resolutions, which were passed at the extraordinary general meeting of the company, held on February 16, 1899, will be submitted for confirmation."

The notice then set out the resolutions of the Henderson scheme, and proceeded:—

"These resolutions are those carried in respect of the Henderson's Transvaal Estates, Limited, scheme.

"The agreement between the company and the Henderson's Transvaal Estates, Limited, will, in the event of the resolutions being confirmed, be submitted for approval.

"The directors would suggest that both meetings should be held together.

"I enclose a copy of the proceedings of the extraordinary general meeting held on the 16th inst."

The first meeting of March 3 was held, and the shareholders, thinking the General Finance scheme required further discussion, adjourned that meeting. Thereupon the confirmatory meeting was held, and, after a poll, the Henderson scheme was confirmed.

The plaintiffs contended that the resolutions were invalid on two grounds: first, that the notices did not disclose the fact that certain of the directors were strongly interested in supporting the Henderson scheme; secondly, that the notice of the confirmatory meeting was conditional.

The motion was brought on the above grounds simply, no imputation whatever being made against the directors, who believed that in supporting the Henderson scheme they were acting in the best interests of the company, in which the defendant directors, Henderson and Schlesinger, and the Henderson Company were very large shareholders.

It appeared, however, that the defendant Henderson was also a large shareholder in the Henderson Company, and was consequently interested in its right of call for shares of the new company; that the defendant Van Ryn, another director, had offered to underwrite a portion of the debentures in considera-

tion of a proportionate share in the right of call, which offer was in existence at the date of the first notice, though subsequently withdrawn; and that the defendant Schlesinger, a stockbroker, was largely interested in practically the same way on behalf of himself and his clients.

The company's articles provided as follows:—

"*General Meetings.*

"Art. 51. Seven clear days' notice at the least, specifying the place, day and hour of meeting, and, in case of special business, the general nature of such business, shall be given by notice sent by post or otherwise served as hereinafter provided . . . ."

"*Directors.*

"Art. 78. No director shall be disqualified by his office from contracting with the company, either as vendor, purchaser, or otherwise, nor shall any such contract or arrangement, or any contract or arrangement entered into by or on behalf of the company with any company or partnership of or in which any director shall be a member or otherwise interested, be avoided by reason thereof, ... but the nature of his interest must be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, unless such interest shall appear on the face of any such contract, provided, nevertheless, that no director shall vote in respect of any contract in which he is so interested, and if he does vote his vote shall not be counted."

Warmington, Q.C., *Warrington*, Q.C., and *Gore-Browne*, for the plaintiffs. First, the notices did not disclose the directors' personal interest in the Henderson scheme, and were, therefore, invalid; so that the resolutions cannot bind absent or dissenting shareholders: *Kaye* v. *Croydon Tramways Co.* (1) Secondly, the notice of the confirmatory meeting was conditional, and therefore bad: *Alexander* v. *Simpson.* (2)

Renshaw, Q.C., *G. F. Hart*, and *Nepean*, for the defendant

(1) [1898] 1 Ch. 358. (2) 43 Ch. D. 139.

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Schlesinger. It was not necessary to disclose the directors' interests either in the notices or at the meetings. The question of their profit (if any) was immaterial. In *Kaye* v. *Croydon Tramways Co.* (1) there were really two agreements, one for the sale of the assets, disclosed, the other for the remuneration of the directors, undisclosed. Here everything is disclosed. The shareholder knows that there are 100,000 shares under call for the managers, issuing company, and the guarantors, and it matters not to him who those persons are, directors or otherwise, as long as they can perform their obligations. At a general meeting directors vote, not as directors, but as shareholders: *Grant* v. *United Kingdom Switchback Railways Co.* (2) Of course, they would have to disclose their interests to a board meeting under art. 78.

[On the second point they were stopped by the Court.]

Ingle Joyce, for the defendant Henderson; *W. F. Hamilton*, for the defendant Van Ryn; and *Herbert Reed*, *Q.C.*, and *Austen-Cartmell*, for the defendant company and its ostensible liquidator, took no part in the argument.

Warmington, *Q.C.*, in reply.

KEKEWICH J. The application of the doctrine of *Foss* v. *Harbottle* (3) to joint stock companies involves as a necessary corollary the proposition that the vote of the majority at a general meeting, as it binds both dissentient and absent shareholders, must be a vote given with the utmost fairness—that not only must the matter be fairly put before the meeting, but the meeting itself must be conducted in the fairest possible manner. The well-known case of *Menier* v. *Hooper's Telegraph Works* (4) illustrates that proposition. There is no question of conduct here, either on the part of Mr. Henderson or anybody else. The question is merely whether each shareholder as and when he received the notice of the meeting, in which I include the circular of the same date, had fair warning of what was to be submitted to the meeting. A shareholder may properly and prudently leave matters in which he takes no

(1) [1898] 1 Ch. 358.
(2) (1888) 40 Ch. D. 135, 139.
(3) (1843) 2 Hare, 461.
(4) (1874) L. R. 9 Ch. 350.

personal interest to the decision of the majority. But in that case he is content to be bound by the vote of the majority; because he knows the matter about which the majority are to vote at the meeting. If he does not know that, he has not a fair chance of determining in his own interest whether he ought to attend the meeting, make further inquiries, or leave others to determine the matter for him. It has been argued on behalf of the defendants that there is no necessity for a director to disclose his interest to a general meeting. I observe that a point of that kind was argued in the case of *Kaye* v. *Croydon Tramways Co.* (1), because it is alluded to by Lindley M.R. in his judgment. I do not remember any argument on that point in this Court, and certainly if I used any language indicating that I considered it the duty of a director to disclose his interest to a general meeting, as under all common form articles of association it is his duty to disclose such interest to a board meeting, my language failed to convey my meaning. Any such proposition was far from my intention. But it is quite another thing to say that a director's interest must be disclosed, not because it is his duty to disclose it, but because it is the duty of the board to tell the shareholders precisely or approximately that about which they are to vote. That is the question which I have to consider here. I have before me the notice and circular of February 7, which I think must be treated as one document. There is no inconvenience, irregularity, or impropriety in supplementing, as is often done, a notice by an explanatory circular; and though the shareholder perhaps strictly might say, "Why trouble me with a circular? What I am entitled to is a notice"; still I think may be fairly expected to look at the two as one document, and he has both before him for his consideration. The notice in this particular case contains nothing really except a resolution to be proposed, and I pass over that part of the compound document. The circular contains a great deal more, and it is important to observe that it expressly says that a call on shares is reserved as to 50,000 for the managers and issuing company, and as to the remaining 50,000 for the guarantors, which call has

(1) [1898] 1 Ch. 358.

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to be exercised at par within three years from the date of the formation of the new company. Then a little farther down, in the next paragraph but one, there is a statement that the full issue of the debentures has been guaranteed by the Henderson Company, the result being that the call of 50,000 shares is stated to belong to the Henderson Company. It is a little more difficult to understand from the circular what is to be done with the other 50,000 shares. They are to be reserved for the managers and issuing company. The managers are the Consolidated Gold Fields of South Africa, Limited; but I do not find any mention of the issuing company, and that seems to me a fault in drafting the circular. But that is of little importance, because the issuing company might be any company. I do not understand it to be suggested that the issuing company were the Henderson Company; but as long as there was some company issuing, and they with the proposed managers had the call of 50,000 shares, this circular, though not quite plain and explicit, is sufficiently plain for practical purposes. Now, Mr. Henderson was a very large shareholder in the Henderson Company, and he was likely to receive considerable benefit from the adoption of this scheme. It is said that it was well known, at any rate to a large number of the shareholders, that he occupied that position; and I think it must be taken to have been well known that the Henderson Company was largely interested in the reconstruction of the company—largely interested, that is to say, in the company, reconstructed or not reconstructed. I am not disposed, however, to attach much weight to the position of Mr. Henderson. I think it would have been better, and made the matter clearer, if that position had been a little dwelt upon in the circular; but I do not think that point alone would be sufficient to justify me in saying that this circular was not thoroughly explicit so as to put the matter fairly before the shareholders.

But two other directors were distinctly interested. Mr. Van Ryn had agreed to underwrite a certain number of the debentures. I will take it from his own affidavit. He says: "I agreed to underwrite or guarantee the subscription of a portion of the debentures, and was to receive as commission or re-

muneration for so doing a call on certain shares of the new company in the same proportion as others who were willing to underwrite the debentures." It seems that later he withdrew from that offer, and there was no binding contract; but when the notice was issued he had made what he and ordinary persons call an agreement, although it may not be enforceable in a court of law, to underwrite the debentures and to receive a commission for the same, and that fact was not disclosed. Mr. Schlesinger, another director, was still more largely interested, practically in the same way. He was a stockbroker, with clients largely interested in this company, and he busied himself on behalf of his clients. He says that he was to receive no benefit from it himself—that he only did it on behalf of his clients. It seems to me impossible to go into that. The man who really entered into the agreement by which he was to receive a large benefit, namely, a call on shares to the extent of 12,500, a fourth of the 50,000, was Mr. Schlesinger, and how he was to distribute them among other people seems to me to be perfectly immaterial. He was the only man known to the directors—the only man known to those who were framing this reconstruction scheme. Who his clients were was not stated, and was not inquired into by any one. That is a fact which is left out again; and, therefore, the shareholder who receives this circular is told, no doubt, that there is to be a call on 50,000 shares for the managers and the issuing company, and another 50,000 for the guarantors; but he is not told that some of his own directors, the persons whom he is trusting to put the scheme before the meeting, are themselves largely interested in that scheme, and that they are to have a portion of the call on those shares. The shareholder must be regarded as a man of ordinary prudence. Treating it as a commercial matter, he has invested his money in this company; the company is in difficulties, and reconstruction is necessary, and what he has to consider when the notice and circular come to him is whether, on the whole, this is the best thing that can be done. He is either to vote himself in person or by proxy, or he is to leave it to the majority to decide. It seems to me impossible to exclude from the matters which he

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ought, as a prudent man, to consider, the question whether some of his directors should be remunerated by means of this call on shares. It is really the same thing which occurred in *Kaye* v. *Croydon Tramways Co.* (1) There is a passage in Rigby L.J.'s judgment (2) which I read as expressing in his own language his agreement with the language of the Master of the Rolls: "I quite agree with what the Master of the Rolls has said, that no man of business would ever come to the conclusion that when a meeting was summoned for the purpose of sanctioning a sale from the company to a purchaser it was also intended at that meeting to do so different a thing as to sanction the payment of part of the consideration that was to proceed from the purchaser, not to the company, but to the directors of the company." It seems to me that with a very slight change those words may be applied to this case. Why should any shareholder reading this circular think for a moment that two of his directors (I am excluding Mr. Henderson) were to have a large proportion of the 50,000 shares on which there was to be a call in favour of the guarantors? He is told that the guarantors were the Henderson Company. He is not told that the guarantors were to be some of his own directors, and that they were to derive a personal benefit. Of course I am told, and with perfect honesty no doubt, that these gentlemen only wished to do the best for the company, that they were largely interested in it, and they thought it the best thing to do. True; but they did so for a commission, or for remuneration; and they were not prepared to do the best they could without being paid for it—neither Mr. Schlesinger nor Mr. Van Ryn; and those facts were not stated in the circular. If a meeting properly convened, and properly instructed as to the purpose for which it is convened, chooses to assent to this, there is no reason why it should not do so; but I think it ought to have the opportunity of considering the point. The man I am protecting is not the dissentient, but the absent shareholder—the man who is absent because, having received and with more or less care looked at this circular, he comes to the conclusion that on the whole he will not oppose the

(1) [1898] 1 Ch. 358. (2) [1898] 1 Ch. 373.

scheme, but leave it to the majority. I cannot tell whether he would have left it to the majority of the meeting to decide if he had known the real facts. He did not know the real facts; and, therefore, I think the resolution is not binding upon him.

On the second point I did not call on the defendants. It seems to me that *Alexander* v. *Simpson* (1) is an entirely different case. There the notice summoning an extraordinary general meeting notified that if the resolutions were passed another extraordinary general meeting would be held on a certain date to confirm those resolutions. The Court of Appeal held that that was not sufficient—that the shareholder was entitled to know, not whether a meeting would be held in a certain event, but whether it would be held as a certainty; he was entitled to be told after the resolutions were passed that they would be submitted for confirmation on a certain date. He was entitled, in other words, first to throw the notice into the waste-paper basket, and leave it to the general meeting to determine whether the resolutions should be passed; and, afterwards, at a later date, to consider whether it was worth while to oppose their confirmation. He had no chance of that, because he was never told that they were passed. He was never told, therefore, that there was to be, in fact, a confirmatory resolution. Here there was a separate notice convening the confirmatory meeting; and that is, no doubt, to some extent, in the alternative—that is to say, there were two schemes to be put before the meeting: a new scheme which had only been mentioned at the first meeting, and the old scheme which had been provisionally established thereat; and, if that new scheme was passed, the scheme which had received the approval of the first meeting would, of course, be out of the question altogether, and to that extent there was a conditional element about it. But there was to be one meeting, and the curious expression that the directors proposed to hold both meetings together means, no doubt, that they should be held, not actually together, but one after the other, so that the same shareholders should be present at them both, and that there practically should be

(1) 43 Ch. D. 139.

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one meeting, though in theory two. The shareholders there had notice of a meeting to be held on a particular day, and it matters little that in the first part of the meeting, which for some purposes was a separate meeting, one set, and in the second part another set, of resolutions was to be considered. Nor does it seem to me to matter that the second part of the meeting might never really take place. The meeting was to be held at a certain place, time, and date. I think that the shareholder had ample notice of what was intended to be done, that there was nothing conditional to affect his mind, and that *Alexander* v. *Simpson* (1) does not apply to such a case as that. But, on the other ground, I think the plaintiffs are entitled to the injunction they ask.

Solicitors for plaintiffs: *Hicks, Davis & Hunt.*

Solicitors for defendant Schlesinger: *Michael Abrahams, Sons & Co.*

Solicitors for defendant Henderson: *Hollams, Sons, Coward & Hawksley.*

Solicitors for defendant Van Ryn: *Wilson, Bristows & Carpmael.*

Solicitors for defendant company and defendant Neall: *Foss & Ledsam.*

(1) 43 Ch. D. 139.

G. R. A.

NUTT *v.* EASTON.

COZENS-HARDY J.

[1897 N. 1802.]

1899

Mortgage—Power of Sale—Bonâ fide Sale to Solicitor—Action to Set Aside—Laches.

March 14, 15.

In August, 1887, the executrix of the mortgagee of a reversionary interest employed E., a solicitor, to obtain probate of the mortgagee's will, and in October, 1887, E. being anxious to realise the mortgage, she asked E. to find a purchaser, when he reluctantly agreed that, if she or he could not find a purchaser by Christmas, he would buy. No purchaser was found, and in January, 1888, the executrix, in bonâ fide exercise of the power of sale contained in the mortgage, sold and conveyed the reversion to E. for more than its actuarial value. E. gave notice of his purchase to N., who had some time previously bought the equity of redemption, and who at once took legal advice as to his position and rights, but took no steps to set aside the transaction until ten years afterwards, when the reversion fell into possession:—

Held, (1.) that the sale could not be set aside, for that on the evidence E. was not acting as solicitor of the mortgagee at the time of the sale to himself; and (2.) that, even if E. did act as solicitor for the mortgagee in the matter of the sale, N. was barred by his laches and acquiescence.

Under the will and codicil of his grandfather W. Royou, who died in 1873, W. E. Royou was, at the date of the mortgage hereafter stated, entitled in reversion expectant on the death of his father and mother, and contingently on his surviving his father, to a sum of 657*l.* four and a half per cent. debenture stock of the Metropolitan Railway Company.

By an indenture of mortgage dated May 15, 1884, and made between W. E. Royou of the one part and R. H. Matthews of the other part, W. E. Royou assigned his said contingent reversion to R. H. Matthews by way of mortgage as security for 150*l.* then advanced to him and interest thereon.

In October, 1886, W. E. Royou sold his said contingent reversion to the plaintiff J. W. Nutt for 15*l.*, its then actuarial value, and it was duly assigned to him subject to the mortgage of May 15, 1884, and on November 22, 1886, the plaintiff gave notice in writing of his purchase to R. H. Matthews. In reply to that notice the plaintiff, on or about December 1, 1886, received from a Mr. Easton, as solicitor for R. H. Matthews, a

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letter stating that he was instructed to recover the money secured by the mortgage by sale or otherwise.

In April, 1887, R. H. Matthews, in exercise of his power of sale as mortgagee, put up the reversion for sale by public auction, and employed Mr. Easton in the matter. The sale was abortive. The plaintiff had notice of this sale.

In August, 1887, R. H. Matthews died, having by his will appointed his wife, Ellen Matthews, his sole executrix, and she employed Mr. Easton as her solicitor to obtain probate of her husband's will. Mrs. Matthews was anxious to realize the mortgage, and shortly afterwards, in October, 1887, asked Mr. Easton to buy the reversion, when he reluctantly agreed that, if she or he could not find a purchaser by Christmas, he would do so. He made several attempts to sell the same for Mrs. Matthews, but was unable to find a purchaser, and in January, 1888, he agreed to purchase it of her under her power of sale for 180*l.*, and it was duly conveyed to him by a deed dated January 24, 1888. Notice of this sale was the same month given by Mr. Easton to the plaintiff, who at once took counsel's opinion as to his position and rights, and was advised that the sale could be set aside, but decided to let the matter slide and to await the course of events.

Mr. Easton died in February, 1895, and the defendants were his executors.

The mother of W. E. Royou survived his father and died in April, 1897, and thereupon this reversion fell into possession.

In December, 1897, the plaintiff commenced this action against the executors of Mr. Easton, and by his statement of claim alleged that Mr. Easton was at the time of the negotiation of the sale, which purported to be carried into effect by the deed of January 24, 1888, acting as the solicitor for Ellen Matthews and as her adviser in the said sale; and the plaintiff claimed a declaration that the deed of January 24, 1888, did not constitute a valid execution of the power of sale contained in the mortgage of May 15, 1884, and that the deed of January 24, 1888, ought to stand as a security only for the sum of 180*l.* and interest from that date, and consequential relief.

By their defence the defendants did not admit that Mr. Easton

was acting as solicitor for Ellen Matthews at the time of the said sale by her to him, and they alleged that the plaintiff had notice at that time of all the circumstances of the case, and denied his right to any relief; and submitted that if he was ever entitled to any relief he was barred by his laches and acquiescence.

The action now came on for trial.

It was admitted that the transaction between Mrs. Matthews and Mr. Easton was entirely bonâ fide, and that the price paid (180*l.*) was considerably more than the then actuarial value of the property.

It appeared from Mr. Easton's diary and bills of costs that the 180*l.* was paid, as to 62*l.* by setting off Mr. Easton's bill of costs for that amount for work done as solicitor, partly for Mr. Matthews during his life and partly for Mrs. Matthews as executrix, in obtaining probate of her husband's will, and that the balance of the purchase-money was paid in cash; that the last item in the above bill of costs was dated October 22, 1887; and that no subsequent bill of costs was rendered by Mr. Easton to Mrs. Matthews, nor did he make her any charges in respect of the sale to him in January, 1888.

Eve, Q.C., and *C. Johnston Edwards*, for the plaintiff. A sale by a mortgagee to his solicitor or agent acting in the matter of the sale cannot stand, even although there is no evidence of undervalue: *Martinson* v. *Clowes* (1); *Whitcomb* v. *Minchin* (2); *Downes* v. *Grazebrook* (3); *Orme* v. *Wright* (4); *Marriott* v. *Anchor Reversionary Company* (5); *Lawrance* v. *Galsworthy* (6); *Farrar* v. *Farrars, Limited.* (7) On the evidence Easton was acting for Mrs. Matthews in the matter of the sale. His purchase is referable to the antecedent arrangement in October, 1887.

Astbury, Q.C., *Russell, Q.C.*, and *W. J. Lewin*, for the defendants. Easton was not employed to sell the property. He was asked to find a purchaser, and failed. He never sent

(1) (1882) 21 Ch. D. 857.
(2) (1820) 5 Madd. 91.
(3) (1817) 3 Mer. 200.
(4) (1839) 3 Jur. 19, 972.
(5) (1861) 30 L. J. (Ch.) 122, 571.
(6) (1857) 3 Jur. (N.S.) 1049.
(7) (1888) 40 Ch. D. 395, 403.

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Mrs. Matthews a bill of costs for trying to find a purchaser. No purchaser could be found, and afterwards, with great reluctance, he bought and gave more than the actuarial value. It was not a sham sale, but a bonâ fide transaction, and cannot now be set aside. He was not acting as her solicitor at the time he bought. In *Orme* v. *Wright* (1) there was evidence of undervalue, and it was a very different case to this. Here the relation of solicitor and client did not exist in January, 1888, and the parties acted in good faith and the transaction cannot be impeached by third parties: *Kennedy* v. *De Trafford* (2); *Knight* v. *Bowyer*. (3) Further, the plaintiff knew all the facts at the time and elected not to bring his action, and has lain by for ten years, and is barred by his laches and acquiescence: *Beckford* v. *Wade* (4); *Clegg* v. *Edmondson* (5); *Levy* v. *Stogdon*. (6)

Eve, Q.C., in reply. It is submitted that the relation of solicitor and client subsisted to the date of the sale. The arrangement was that he was to have till Christmas to find a purchaser.

[COZENS-HARDY J. There is no charge in his bill of costs for business done for Mrs. Matthews after October, 1887, and I shall assume that none was done.]

It is submitted that the true inference is that no efforts to sell were made, and that he bought in pursuance of the previous agreement. If so, on the authorities the sale cannot stand. As to delay, the plaintiff was under no obligation to redeem at that time. He was not in a position to do so, and might have been foreclosed. He was not bound to elect at any particular time, but was entitled to treat the transaction as a transfer of the mortgage and to abide the course of events.

COZENS-HARDY J. In this case the plaintiff has failed to make out any title to relief. From an early stage in the case it struck me that it really depended on a point of law, but that point of law did not clearly arise until the evidence which has

(1) 3 Jur. 19, 972.
(2) [1897] A. C. 180.
(3) (1857) 23 Beav. 609; S. C. on appeal, (1858) 27 L. J. (Ch.) 520.
(4) (1810) 17 Ves. 87.
(5) (1857) 8 D. M. & G. 787.
(6) Ante, p. 5.

been given by the plaintiff in the box this morning brought out the material facts. There was a time when it was thought and said that a mortgagee selling under a power was a trustee, and apparently that he was subject to all the obligations and disabilities of a trustee. It was said a mortgagee must sell for the best price. It was said that an agent for the mortgagee could not buy the property—not, of course, simply as a trustee for the mortgagee, but for himself beneficially. I think all those doctrines and all those principles really depend upon one proposition—aye or no, is a mortgagee selling under a power of sale to be regarded as in the full sense of the word a trustee? If he is not, it is very difficult to see how a transaction between a mortgagee selling and his own solicitor, even though it may be capable of being impeached by the client—that is to say, the mortgagee—can be open to question at the instance of the mortgagor, who never stood in the relation of client to the solicitor purchasing. I am happily relieved by recent authorities from considering what is the true position of a mortgagee selling under his power of sale. In *Farrar* v. *Farrars, Limited* (1), in the Court of Appeal, the present Master of the Rolls, in delivering the judgment of the Court, says this (2): "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts bonâ fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." Subsequent to that the law is laid down even more strongly and more clearly in the House of Lords by Lord Herschell in the case of *Kennedy* v. *De Trafford*. (3) He says (4): "My Lords, I am

(1) 40 Ch. D. 395.
(2) Ibid. 410.
(3) [1897] A. C. 180.
(4) Ibid. 185.

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myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor . . . . It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion." Lord Macnaghten says this (1): "If a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached." Now here it is really not disputed that there was good faith as between Mrs. Matthews, in whom the power was vested, and Mr. Easton. There is no allegation of bad faith; and if there was any allegation, there is no evidence of it. I am asked to treat the transaction as not a transaction of sale at all. I fail to see on what ground I can do that. In form it was a sale—in substance it was a sale—it was a sale made in good faith and for a price the sufficiency of which is not even challenged at the bar. I cannot, therefore, treat the transaction as no sale at all—as one absolutely void. It bears no resemblance to a so-called sale which might take the shape of a sale to an individual merely as trustee for the vendor. That would be no sale at all. Here I regard the sale as a sale possibly voidable, but nevertheless a sale only voidable, not void. I am not satisfied that this sale in the present case could have been avoided by Mrs. Matthews, the client of Mr. Easton. However that may be, I fail to see any ground on which it could have been avoided by the plaintiff, who never stood in the position of client to Mr. Easton, the solicitor. In my view that is enough to dispose of the matter. But, further, I am not satisfied upon the evidence in this case that Mr. Easton ever was acting as solicitor in the matter of the sale at or for some time before the transaction which resulted in the conveyance to him as purchaser. But, even if he was, there is to my mind yet another fatal objection to this action. The circum-

(1) [1897] A. C. 192.

stances were well known to the plaintiff in January or February, 1888. He says, if I may believe him on that point, that he consulted counsel, and was advised that the sale was not a good sale and could be set aside. He knew the facts, and he knew the rights on which he now relies. He deliberately stands by for ten years, and now asks for relief on equitable grounds. It is unnecessary to refer to the authorities as shewing that it is not competent for a person seeking to set aside a deed or a transaction, on facts which were within his own knowledge many years ago and after being advised, to come to the Court after a lapse of ten years. On all these grounds I think the action fails, and must be dismissed with costs.

Solicitor for plaintiff: *J. W. Nutt.*
Solicitors for defendants: *Easton & Cargill.*

H. L. F.

HOPE *v.* WALTER.

[1898 H. 634.]

Vendor and Purchaser—Specific Performance—Property used as a Disorderly House.

Property sold by auction as an eligible freehold, and which consisted of a tenement used as a house and shop, was discovered before completion to be used by the vendors' quarterly tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, and a proviso for re-entry in case of breach of covenant:—

Held, in accordance with the observations of Wigram V.-C. in *Lucas* v. *James*, (1849) 7 Hare, 410, 418, that the improper use of the property was not a sufficient ground for refusing specific performance at the suit of the vendors.

THE property in respect of which the action was brought formed lot 1 of several lots put up for auction by the plaintiffs, who were trustees, on December 1, 1897, under conditions annexed to particulars of sale.

The particulars described lot 1 as "The eligible freehold property for investment comprising the brick-built corner house

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and shop known as" [address and description]. "The accommodation is as follows: On the second floor—three rooms. On the first floor—two rooms and w.c. On the ground-floor—double-fronted shop, parlour, kitchen, and coal cellar. Side entrance. Let on a quarterly tenancy under agreement dated 20th July, 1895, at a rent of 55*l.* per annum." By the conditions it was stated that counterparts or copies of the leases or agreements of tenancy might be inspected during the five days prior to the sale, and it was provided that each purchaser should be deemed to purchase with full notice of and to take subject to the terms of all tenancies and the state of the property notwithstanding any partial or incomplete statement in the particulars; and that the purchase was to be completed on February 8, 1898, at the office of the vendors' solicitors.

The defendant purchased lot 1 at the auction, paid the required deposit, and signed a contract to purchase on the terms of the conditions of sale.

On December 20, 1897, the defendant's solicitors sent a letter with their requisitions suggesting that the house was used for an immoral purpose, and that the defendant might refuse to perform the contract; but the plaintiffs denied knowledge of such user.

The agreement of tenancy contained a covenant by the tenant not to keep the house as a disorderly house, and a power of immediate re-entry on breach of any of the covenants.

Prior to and at the date of sale the property forming lot 1 was used as a coffee tavern.

On the day fixed for completion the defendant's solicitors wrote that the defendant had determined not to purchase the property owing to the alleged immoral user of the property.

The plaintiffs by their pleadings asked for specific performance of the contract to purchase, and the defendant counterclaimed for rescission of the contract and return of the deposit on the ground (inter alia) that the property was used ostensibly as a coffee tavern, but in fact as a brothel or disorderly house, and was not therefore an eligible property for investment.

The action was tried before Cozens-Hardy J. on March 17, 1899.

Astbury, Q.C., (*R. B. Yardley* with him), for the plaintiffs, opened the plaintiffs' case.

Eve, Q.C., and *Tomlin*, for the defendant. Specific performance of the contract ought not be granted. What the plaintiffs wish to force on the defendant is something differing in substance from that which was offered for sale.

What was said by Wigram V.-C. in *Lucas* v. *James* (1) does not apply in its full extent to this case, and was not, moreover, necessary to the decision in that case. There, the defect complained of was only in the neighbourhood—not in the property sold itself, as in this case.

There was here a mutual mistake as to the subject-matter. The property was not, as the vendors described it and as the purchaser was led to believe it to be, an eligible investment. The description entitled the purchaser to believe that the shop was used for legitimate and not immoral business.

The ruling in *Lucas* v. *James* (1) is too wide. The mere fact that a vendor has been innocent does not disentitle the purchaser to relief: *Earl of Durham* v. *Legard*. (2)

The property has been depreciated in value by being used for immoral purposes, and, in exercising its discretion as to granting specific performance, the Court will refuse to inflict a great hardship on the purchaser: *Wedgwood* v. *Adams* (3); *Falcke* v. *Gray*. (4) There may be a hard bargain although one party is as ignorant as the other and has not taken advantage of him. One principle which guides the Court in exercising its discretion is that a man must not be forced to take something which he has not contracted to buy.

If specific performance is granted, the purchaser will be liable to prosecution for wilfully allowing the property to be used as a disorderly house: Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, sub-s. 3; *Gully* v. *Smith*. (5) In such a case the purchaser, finding he is liable, by reason of circumstances unknown to him when he entered into his contract, to be placed in an illegal position, may repudiate his

(1) 7 Hare, 410, 418.
(2) (1865) 34 Beav. 611.
(3) (1843) 6 Beav. 600.
(4) (1859) 4 Drew. 651, 658.
(5) (1883) 12 Q. B. D. 121.

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contract: *Clay* v. *Yates* (1); Dart's Vendors and Purchasers, 6th ed. vol. ii. p. 1172.

Astbury, Q.C., was not called upon to reply.

COZENS-HARDY J. This is an action for specific performance of an agreement to purchase property which is described in the particulars of sale as "the eligible freehold property for investment, comprising the brick-built corner house and shop," stating the situation, "with omnibus and tramway routes passing the door." Then there is a description of the accommodation, and the property is described as "let on a quarterly tenancy under agreement dated July 20, 1895, at a rent of 55*l.* per annum." Now, every word of that description is true. The situation is right, and it is a shop; there is a quarterly tenancy, and the rent is 55*l.* per annum. But this case has been argued on the assumption, which, for the present purpose and for the present purpose only, I assume to be true, that at the date of the contract and for some time before this coffee-house had been used for immoral purposes, and that the tenant had, I think in the year 1897, been convicted at Clerkenwell for keeping it as a disorderly house. It is also assumed—indeed, it is admitted—that the plaintiffs, who are selling as trustees, were as ignorant as the defendant, the purchaser, was of the improper use to which the premises were being put.

It is said that that circumstance is a ground for rescinding the contract, or if not, for refusing specific performance, and I am asked to hold that there was such a mistake as to the subject-matter of the contract that the Court ought to set it aside; or that, even if it does not go so far as that, the case is one of such hardship that the Court, in the exercise of its discretionary jurisdiction as to specific performance, ought to refuse to interfere, and merely give the plaintiffs damages in the shape of allowing them to retain the deposit. In my judgment both these grounds fail.

At an early stage in the proceedings my attention was called to the decision of Wigram V.-C. in the case of *Lucas* v. *James* (2), just fifty years ago. There the contract was a

(1) (1856) 1 H. & N. 73. (2) 7 Hare, 410, 418.

contract for the sale of a house in which the purchaser intended to reside, and he declined to complete the purchase on the ground (amongst others) that he had discovered, as the fact was, that some houses in the immediate neighbourhood were disorderly houses and of such a character that the house which he had contracted to purchase was not at all suitable for the residence of his family. The judgment of Wigram V.-C. states this as settled law—the passage I am about to read is on page 418 of the report:—"Several points are made by the defendant. First, that, on the discovery of the character of certain houses in the immediate neighbourhood of the house the subject of the treaty, he had a right to abandon the agreement if it had been made. I wish authority could have been produced in support of that proposition, for it is plain that the defendant must suffer, and that seriously, if the contract is to be enforced in equity. The law, as stated by Sir Edward Sugden, respecting defects in the subject of a contract (and I believe correctly), is this:—that if the vendor, at the time of the contract, does not know of the existing defect in the estate, the Court will enforce the contract; otherwise, perhaps, if the defect be known to the vendor, and be one which a provident purchaser could not discover. I presume the law is the same where the value is affected by a nuisance in the neighbourhood." Now, it is quite true that in the case before Wigram V.-C. the nuisance did not exist in the house itself, but existed in the adjoining houses; but the Vice-Chancellor treated the law as perfectly settled in a case where the nuisance existed without the knowledge of both parties even in the house itself.

I cannot regard this as in any sense a mutual mistake as to the subject-matter of the contract. I think it is a case in which the property is exactly that which was described, although without the knowledge of both parties the premises were being used for an improper purpose. It is not unimportant to observe that the property is described to be and in fact is let on a quarterly tenancy, and that, if the improper user of the house continues, the tenant can, under the terms of the agreement, be turned out at once without any notice. I therefore think

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there is no ground upon which I can accede to the counter-claim of the defendant and rescind the contract.

Then is there any reason for refusing specific performance? I think not. That the Court can refuse specific performance on the ground of hardship there can be no doubt; but I do not think that the mere circumstance that the defendant for his own sake, and as an honourably-minded man, may think it necessary and proper at once to turn out the tenant is any ground on which I should refuse to enforce specific performance of this contract.

Solicitors for plaintiffs: *Shoubridge & May.*
Solicitors for defendant: *Attree, Johnson & Ward.*

F. E.

COZENS-HARDY J. 1899 *April* 14, 18.

McFARLANE *v.* HULTON.

[1898 M. 1241.]

Newspaper—"Publication"—"Sporting Paper."

A newspaper is published when and where it is offered to the public by the proprietor; it may be published in more than one place, and where its proprietor has two offices in two different towns, at each of which he offers for sale or distribution copies of his paper, the paper is published at each office.

On the sale of *Bell's Life in London* the vendors agreed with the purchaser not to print or publish any sporting paper within ten miles of a certain London street:—

Held, that the publication within this area of a paper containing no racing or betting odds, but merely recording such amateur sports as cricket, football, cycling, and running, was not a breach of the agreement.

THE plaintiff, W. McFarlane, was at the date of the agreement mentioned below and at the time of the action the proprietor of a daily newspaper called the *Sporting Life* and of other sporting periodicals, and the firm of Edward Hulton & Co., which at the date of the agreement consisted of Edward Hulton and E. O. Bleackley, was at the last-mentioned date the proprietor of *Bell's Life in London*, a sporting paper printed and published in London. Hulton & Co. also printed and published another sporting paper in Manchester.

By an agreement in writing dated May 21, 1886, and made

between Bleackley and Hulton, therein described as "of 31, Bouverie Street, Fleet Street, in the City of London, joint proprietors of a newspaper known as *Bell's Life in London*, and published at 31, Bouverie Street aforesaid (hereinafter referred to as the vendors)," of the one part, and McFarlane, therein described as "of 148, Fleet Street aforesaid, and proprietor of a newspaper known as *Sporting Life* (hereinafter referred to as the purchaser)," of the other part, it was agreed that the vendors should sell and the purchaser should purchase (*a*) the copyright in *Bell's Life in London*, including the sole and exclusive right to print or publish a newspaper or other periodical paper under the same name or style, or under any name or style of which *Bell's Life* should form part; (*b*) such copyright as the vendors possessed in a periodical paper intituled *Fistiana*.

The agreement contained, inter alia, the following clauses:—

"(3.) The vendors will not, nor will either of them, do or suffer anything whereby their offices and premises at 31, Bouverie Street, may at any time during the term for which they are at present entitled to the same be used for the purpose of printing and publishing any sporting paper. (4.) The vendors will not, nor will either of them, print or publish, or cause to be printed or published, or permit their or either of their names to be used in connection with any sporting paper or periodical within ten miles of Bouverie Street aforesaid."

After the completion of the purchase the plaintiff incorporated *Bell's Life in London* with the *Sporting Life*.

Bleackley died before the commencement of the action.

The plaintiff claimed an injunction to restrain Hulton & Co. from publishing at 68, Fleet Street, to which they had removed their London business, any sporting paper or periodical; and the circumstances in respect of which they claimed were stated as follows in his Lordship's judgment: "The defendants carry on business at Manchester, and they are the owners and publishers of the *Sporting Chronicle* (a daily paper published by them before 1886), the *Athletic News* (a weekly paper also published before 1886), and the *Sporting Chronicle Weekly Handicap Book* (which was started subsequently to 1886)."

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"All these papers are printed at Manchester, where the main office of the defendants undoubtedly is. The course of business is as follows: The *Sporting Chronicle* is printed at Manchester in time for the midnight train from Manchester to Euston. This midnight edition is often, if not always, different from that which is sold at Manchester in the morning, inasmuch as late news arriving after midnight is inserted in the Manchester issue. Parcels of the *Sporting Chronicle* thus printed are sent together to Mr. Healey, a distributing agent, who receives them at Euston and delivers them to the various persons to whom they are addressed. Amongst several parcels is one addressed to the *Sporting Chronicle*, and this is delivered before business hours at the defendants' office in Fleet Street. On the days when the two weekly periodicals are issued at Manchester they are likewise included in the parcel. The parcel thus delivered to the defendants at their office in Fleet Street varies in its contents, but the average number of copies is stated to be as follows: *Sporting Chronicle*, 50 to 100 per day; *Athletic News*, 400 to 2500 per week; *Handicap Book*, 400 to 500 per week. These figures, though by no means insignificant, represent only a small proportion of the total circulation of the papers. The copies so delivered are used partly for the purpose of exchange with other papers, partly for filing, and to a considerable extent for sale, and mostly, if not entirely, at trade prices. The *Sporting Chronicle* and the *Athletic News* had an office in the same building as *Bell's Life* in Bouverie Street. This office was not called a publishing office. It was an office at which advertisements were received and other business done, but substantially the business done at Bouverie Street in 1886 was business of the same nature as that now done at Fleet Street. The defendants have since moved twice, and in the year 1897, at their present office at 68, Fleet Street, they caused to be painted up a notice to the following effect: '*Sporting Chronicle* and *Athletic News* Advertising and Publishing Office.'"

After the action had been brought the words "publishing office" were painted out.

The *Athletic News* contained no racing intelligence and no

betting odds, but was merely a record of amateur sports, such as cricket, football, cycling, and running.

Numerous witnesses were called at the trial as to the meaning of the words "publication" and "sporting paper."

Eve, Q.C., and *Woodfin*, for the plaintiff. The main object of the agreement, which was entered into for valuable consideration, was to protect the property which the plaintiff purchased. What the defendants are doing is a breach of clause 4 of the agreement. The *Sporting Chronicle*, the *Athletic News*, and the *Sporting Chronicle Weekly Handicap Book* are all sporting papers or periodicals, and the defendants are publishing all three papers within the area forbidden by the agreement. A paper is "published" at the time when and the place where it is offered for sale. Publication may take place in two or more places. Some papers proclaim that they are published in more than one place—for instance, the *North British Daily Mail* and the *Western Morning News*. Until the defendants' papers have left the hands of the distributing agent the defendants have control over them.

The defendants have themselves accurately described their London place of business as a "publishing office."

Astbury, Q.C., and *Ashton Cross*, for the defendants. The defendants' case is that their papers are not published in Fleet Street, but in Manchester; that the *Athletic News* is not a sporting paper; and that the plaintiff is precluded by his laches from obtaining an injunction.

"Publishing" a newspaper is bringing it into existence.

[COZENS-HARDY J. Is not that done by printing?]

Perhaps it would be more correct to say that it is bringing it into existence as a newspaper for the purposes of sale. The word "publishing" is not used in the same sense as the word is used when speaking of a libel.

[*Eve, Q.C.*, referred to the words "printed in order to be dispersed" in s. 1 of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60).]

The definition there given must be with reference to papers printed and published outside England or Ireland. The papers

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are the property of the distributing agent from the time when the carriers receive them, and he is not our agent.

A newspaper is published once for all; it cannot—at any rate as a rule—be published in more than one place.

The *Athletic News* is not a sporting paper within the meaning of the agreement. It is entirely different from the plaintiff's sporting papers. It contains no racing intelligence, and is silent as to betting. Its contents are devoted to news as to amateur and innocent amusements like cricket and football, which is not the "sporting" news contemplated by the agreement.

Eve, Q.C., in reply.

Cur. adv. vult.

April 18. COZENS-HARDY J. In this action the plaintiff, who in the year 1886 purchased from the defendant Hulton and another the copyright in *Bell's Life in London*, and in a book called *Fistiana*, seeks to restrain the defendants from publishing at 68, Fleet Street any sporting paper or periodical. The contract for sale of May 21, 1886, contained two clauses—3 and 4—which are material for the purposes of this action. [His Lordship read the two clauses, and continued:—]

The plaintiff alleges that what the defendants are doing is a breach of clause 4. In order to decide this question, it is necessary to state precisely what it is that the defendants do. [His Lordship stated the facts as set out in inverted commas above, and continued:—]

The plaintiff alleges that this is a breach of clause 4 of the agreement, and there are two questions which arise for my decision. In the first place, are the defendants "publishing" their papers in Fleet Street, and, in the second place, is the *Athletic News* a "sporting paper or periodical" within the meaning of the clause?

What is the meaning of "publishing" a newspaper? It is plainly something different from printing it. I see no reason why a newspaper should not be published in more than one place. In fact, my attention has been called to two well-known newspapers which are expressly stated to be published in several

towns. I refer to the *North British Daily Mail* and the *Western Morning News*. At the end of the *North British Daily Mail* there is printed the following note: "Printed by the Mail Newspapers (Limited), and published at Glasgow, 102 to 114, Union Street; Edinburgh, 4, St. Giles Street; Greenock, Municipal Buildings; Paisley, 4, County Place; London, 190, Fleet Street." And at the end of the *Western Morning News* the following words appear: "Printed and published by Ernest Croft for the *Western Morning News* Company (Limited) at the publishing offices, 31, George Street, Plymouth; 45, Fore Street, Devonport; 27, High Street, Exeter; and 10, St. Nicholas Street, Truro." It seems to me that a paper is published when and where it is offered to the public by the proprietor. Webster's definition of the word is as follows: 'To send forth as a book, newspaper, musical piece, or other, printed work, either for sale or for general distribution."

I received, at the request of both parties, evidence from persons engaged in the newspaper trade as to the meaning of the word "publish." I doubt whether such evidence was admissible, and it was so conflicting that it in no way assisted me. I have endeavoured to ascertain the meaning of the word irrespective of this evidence, and I have come to the conclusion that where a newspaper proprietor has two offices one in Manchester and the other in London, at each of which he offers for sale or distribution copies of his paper, the paper is "published" at each office. I cannot forget that the defendants themselves described their Fleet Street office as a "publishing office"; and although this circumstance would not suffice to make it a publishing office if it were clearly not so, I think, in a case of doubt, it is not unreasonable to hold that the defendants have rightly described what they do in Fleet Street. It can make no difference that, since action brought, they have painted out the words "publishing office." It follows that, in my judgment, the defendants are acting in breach of clause 4 of the agreement.

It remains to consider whether the *Athletic News* is a "sporting paper" within the meaning of clause 4. The covenant was for the protection of the copyright and goodwill of

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the papers which were sold, and regard must be had to this circumstance in interpreting the clause. Now the *Athletic News* contains no racing intelligence and no betting odds, and is merely a record of amateur sports, such as cricket, football, cycling, running, &c. It in no way resembles *Bell's Life* or the *Sporting Life*. It appeals to a different section of the public. It undoubtedly is devoted to "sports" in one sense of the word; but upon the whole I do not think that a paper which deliberately excludes all racing and betting intelligence is a "sporting paper" within the meaning of clause 4. The result is that I must grant an injunction as prayed, so far as the *Sporting Chronicle* and the *Handicap Book* are concerned; but the injunction will not extend to the *Athletic News*. And the defendants must pay the costs of the action.

Solicitor for plaintiff: *W. Butcher.*

Solicitors for defendants: *R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

F. E.

WALLACE *v.* EVERSHED.

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1899

April 20, 27.

[1897 W. 3774.]

Mortgage—Foreclosure—Parties—Debenture-holders—"Floating Security."

The trustees of a company, by its authority, gave a legal mortgage in fee of its land to the plaintiffs. Subsequently the company issued debentures to secure principal sums and interest which were thereby charged on all its undertaking and present and future property. It was also provided that the debentures were "all to rank pari passu in point of charge as a floating security on the property" thereby charged. The principal moneys thus charged were only to become payable in certain events, none of which had happened.

The plaintiffs commenced a foreclosure action to which they made not only the trustees and the company, but also all the debenture-holders defendants. At the trial it was objected on behalf of the debenture-holders that they were unnecessarily joined as parties:—

Held, that the debenture-holders had an immediate equitable charge; that the working-out of a foreclosure decree in their absence was not a dealing with its property by the company in the ordinary course of its business; and that they were properly made parties to the action.

THIS action was brought to have the plaintiffs' mortgage enforced by foreclosure. The freehold land comprised in the mortgage belonged to a limited company, but was vested in the defendants Evershed and Palmer as trustees for the company, and the mortgage was made by these trustees, but with the company's authority.

The company subsequently granted twenty-five debentures for 100*l.*, by each of which it covenanted that as and when the principal moneys thereby secured became payable in accordance with the conditions indorsed thereon it would pay to the registered holder of the debenture the sum of 100*l.*, and that it would in the meantime pay interest thereon at the rate of 10*l.* per cent. by equal yearly payments. Clauses 3 and 4 in the body of each debenture were as follows: "(3.) The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. (4.) This debenture is issued subject to the conditions indorsed hereon."

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The indorsement on each debenture was as follows: "The Conditions within Referred to.—(1.) This debenture is one of a series of twenty-five debentures of the company of 100*l.* each for securing principal sums not at any one time exceeding 2500*l.* Such debentures are all to rank pari passu in point of charge as a floating security on the property hereby charged. (2.) The interest on this debenture will be payable only on production of this debenture on the annual day within mentioned. (3.) The principal moneys hereby secured will only become payable (*a*) if the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company, calls in such principal moneys; or (*b*) if an order is made or an effective resolution is passed for the winding up of the company; or (*c*) if the company gives six months' notice by advertisement in *The Times*, or notice in writing to the registered holder at his last registered address, of its intention to pay off this debenture." None of the events mentioned in condition 3 had happened. The plaintiffs joined the company, the trustees, and all the debenture-holders as defendants.

At the trial of the action Cozens-Hardy J. held that the plaintiffs were entitled to judgment against the mortgagors on their personal covenant for payment, and to a foreclosure judgment.

Eve, *Q.C.*, and *Borthwick*, for the plaintiffs.

Hughes, *Q.C.*, and *Boome*, for the company and its trustees.

Wright Taylor, for the debenture-holders. The debenture-holders have only a floating security on the assets of the company, and ought not to have been made parties to the action. I therefore ask that the plaintiffs may be ordered to pay their costs. In *In re Continental Oxygen Co.* (1) Kekewich J. held that in a debenture-holders' action, where there was only a floating security, foreclosure could not be ordered in the absence of any one debenture-holder, although the plaintiff professed to be suing on behalf of all the debenture-holders.

(1) [1897] 1 Ch. 511.

But in that case default had been made in payment of the principal moneys secured. Here the principal moneys only become payable in certain specified events, none of which has happened. The debenture-holders, therefore, cannot interfere; and the company is free to dispose of its assets. [He also referred to *Griffith* v. *Pound*. (1)]

Borthwick, for the plaintiffs. The debenture-holders are puisne incumbrancers on the property, and were properly made parties. They have a charge on the company's property, although it is only by way of floating security.

[*Frank Evans*, amicus curiæ, referred to the observations of Lord Macnaghten in *Governments Stock and other Securities Investment Co.* v. *Manila Railway Co.* (2)]

The debenture-holder who has such a charge may enforce his security by obtaining the appointment of a receiver—even before the principal money becomes payable, if his security is in jeopardy.

Cur. adv. vult.

April 27. COZENS-HARDY J. This action is one by first mortgagees seeking, in addition to judgment on a personal covenant for payment, a foreclosure decree against the mortgagors, who are trustees for a limited company. I held at the trial that they were entitled to the relief sought as against the mortgagors, but I reserved for consideration an entirely separate point—namely, whether certain defendants, who are debenture-holders of the company, are or are not proper parties to the action. The debentures are all subsequent in date to the plaintiffs' mortgage. They are in an extremely simple form. [His Lordship referred to clauses 3 and 4 of the body of the debentures and the first and third indorsed conditions, and proceeded:—]

The third condition defines the events upon which the principal moneys will become payable, and none of those events has yet happened. It is admitted that if steps had been taken by the debenture-holders to enforce their security they would be proper defendants to a foreclosure action; but it is contended

(1) (1889) 45 Ch. D. 553. (2) [1897] A. C. 81, 86.

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that so long as it is a "floating security" they have no charge upon the property, or at least have no such charge as entitles the first mortgagees to bring them before the Court. What is the precise effect of a "floating security" of this nature? Does it create a present charge, or is there no effective charge until the debenture-holders apply for a receiver? I think the true view is this. A floating security gives an immediate equitable charge on the assets, subject to a right to the company in the ordinary course and for the purposes of the business of the company, but not otherwise, to dispose of the assets as though the charge had not existed, and if and when the event upon which the capital money is made payable has happened the holder of such a debenture can obtain a receiver and thus enforce his security. Moreover, the Court will, in case of imminent danger to the security, appoint a receiver even before the capital money becomes payable: see *McMahon* v. *North Kent Ironworks Co.* (1) and *Edwards* v. *Standard Rolling Stock Syndicate.* (2) In *Driver* v. *Broad* (3) Kay L.J. used language which is very appropriate to the present case: "It was urged that this was a 'floating' security. That term only expresses what is more fully expressed in the conditions indorsed on the debentures, viz., that the company shall, notwithstanding the debentures, be at liberty to carry on its business, and in the ordinary course of such business to dispose of the property, as if the debentures did not exist. That is the ordinary meaning of the term 'floating security.' It does not mean that there is not to be a charge, and an immediate charge, on the property, but merely that, notwithstanding the existence of the charge on all the property, including the real property, of the company, power is reserved to dispose of the property if in the ordinary course of carrying on the company's business it becomes necessary to do so. The charge is none the less a charge because such a power is reserved." It follows that, in my judgment, the debenture-holders have a charge upon the property from the moment the debentures are issued. The working out of a foreclosure decree in the absence of the debenture-holders could

(1) [1891] 2 Ch. 148. (2) [1893] 1 Ch. 574.
(3) [1893] 1 Q. B. 744, 748.

not be considered a dealing by the company with the property of the company in the ordinary course of its business. If the debenture-holders were not parties to the action, and a foreclosure decree were made, and the company were afterwards wound up, or any other event happened upon which the capital money became payable, I think the plaintiffs would not get a good title under the foreclosure decree. I therefore hold that the debenture-holders were properly made defendants, and the judgment will be in the usual form giving them a right to redeem. There will be one period for redemption.

Solicitors for plaintiffs: *Turner, Son & Foley.*
Solicitor for mortgagors and the company: *Thomas Durant.*
Solicitors for debenture-holders: *Mills, Curry & Gaskell.*

F. E.

WRIGHT J.

1899

May 3, 5.

In re MUTOSCOPE AND BIOGRAPH SYNDICATE.

[00137 of 1899.]

Company—Winding-up—Surplus Assets—Articles of Association.

The regulations of a company with a nominal capital in 1*l.* shares provided that if upon the winding-up the surplus assets should be more than sufficient to repay the whole paid-up capital, the excess should be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up. Some of the shares issued were fully paid up; on others only 10*s.* per share had been paid. There was an excess in the winding-up after paying debts and expenses and repaying all the paid-up capital:—

Held, that the excess was distributable in proportion to the capital actually paid up.

In re Anglo-Continental Corporation of Western Australia, [1898] 1 Ch. 327, distinguished.

THE syndicate was incorporated in July, 1897, with a capital of 60,000*l.* in shares of 1*l.* each, and 26,000 of these were fully paid up. The other 30,357 shares issued were paid up to the extent of 10*s.* per share only. In the voluntary winding-up of the syndicate, after paying all its debts and the expenses of liquidation, the liquidators had a surplus of about 200,000*l.*, and applied under s. 138 of the Companies Act, 1862, for the determination of the questions: In what proportions the surplus should be distributed as between the holders of the fully paid and partly paid shares respectively; and whether any call should be made in respect of the latter.

The articles of association provided that: "(36.) Subject to any priorities that may be given upon the issue of any shares, the profits of the company available for distribution shall be distributed as dividend among the members in accordance with the amounts paid up on the shares held by them respectively." "(42.) If upon the winding-up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid, or which ought to

have been paid on the shares * held by them respectively at the commencement of the winding-up other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

Kirby, for the liquidator, stated the facts, and referred to clauses 36 and 42 of the article of association, and to *In re Anglo-Continental Corporation of Western Australia.* (1).

Upjohn, Q.C., and *R. M. Montgomery*, for the holders of the fully paid shares. The question is purely one of construction. The words " which ought to have been paid " are not material. Each fully paid share confers twice the interest in the surplus assets which a partly paid share confers, these assets being distributable in the same way that dividends are under art. 36.

Theobald, Q.C., and *R. J. Parker*, for the holders of the partly paid shares. The shares all round must first be levelled up or down, and the amount distributable must then be divided in equal parts share for share. It is the " excess " which is to be divided—not the surplus assets. Art. 42 is in the same form as the article in the case referred to, although only the second part of the article was there dealt with.

[WRIGHT J. Here, however, there is not an insufficiency to repay all paid-up capital.]

But " paid-up capital " must have the same meaning in both parts of the clauses, and effect must be given to the words " or which ought to have been paid."

[They also referred to *Ex parte Maude* (2); *Birch* v. *Cropper* (3); *Ex parte Lowenfeld* (4); *In re Driffield Gas Light Co.* (5)]

(1) [1898] 1 Ch. 327.
(2) (1870) L. R. 6 Ch. 51.
(3) (1889) 14 App. Cas. 525.
(4) (1893) 70 L. T. 3.
(5) [1898] 1 Ch. 451.

WRIGHT J. 1899 MUTOSCOPE AND BIOGRAPH SYNDICATE, *In re.*

Upjohn, Q.C., in reply. The observations of Lindley and Davey L.JJ. in *Ex parte Lowenfeld* (1) are in our favour, there being no insufficiency to repay capital paid up.

Cur. adv. vult.

May 5. WRIGHT J. The question for decision is: In what way are the surplus assets to be distributed? The syndicate has so prospered in its business as to have a large amount of surplus assets divisible amongst its shareholders. Of these there are two classes: the holders of (*a*) fully paid vendors' shares; and (*b*) shares on each of which 10*s.* have been paid up. After paying all debts, liabilities, and expenses about 200,000*l.* remains, of which about 41,000*l.* must first be applied in repaying to the shareholders the sum of 1*l.* on each of the vendors' shares, and the sum of 10*s.* on each of the other shares. What is to be done with the balance? The fully paid shareholders say that they are entitled to the full proportion which their paid-up capital represents, and that the others are only entitled to the proportion represented by 10*s.* per share. The partly paid shareholders say that, according to cases like *Birch* v. *Cropper* (2), the division should be in accordance with the number of shares, irrespective of the amount paid up. If there were no provision in the articles as to the method of distribution, it would be tolerably clear that after the capital account had been properly dealt with the balance would be distributable share and share alike. But two articles must be considered. It has been held over and over again that such a provision as art. 36 is not decisive, although it may have some bearing on a question like this. The question for decision really turns on the following words of art. 42: [His Lordship read the words as set out above, down to the asterisk.]

At the conclusion of the arguments I did not think there was any reasonable doubt; but as the amount distributable was large I took time to look at the authorities again. These authorities are referred to in *In re Anglo-Continental Corporation of Western Australia* (3) and in *In re Driffield Gas Light*

(1) 70 L. T. 3. (2) 14 App. Cas. 525.
(3) [1898] 1 Ch. 327.

Co. (1); but there is nothing in the cases to create a doubt in my mind. This is not like the case where the surplus assets are insufficient to repay all the paid-up capital. The distribution must be in accordance with the agreement under the articles—that is to say, the balance, after repaying the paid-up capital, must be divided in proportion to the paid-up capital. No call must be made, and the costs of all parties will come out of the assets.

Solicitors: *Lloyd-George, Roberts & Co.; Field, Roscoe & Co.*

(1) [1898] 1 Ch. 451.

F. E.

END OF VOL. I.

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ADMINISTRATION—*Damages for Misrepresentation, Claim for—Wrongful act done by Deceased Person — Benefit to his Estate — Unliquidated Damages—"Actio personalis moritur cum personâ"—Administration Action.*

The purchaser from a testator of certain worthless shares in a limited company claimed to be entitled to prove in an administration action for damages for misrepresentation against the testator's estate, and assessed his damages at 250*l.*, the price paid by him for the shares :—

Held, that where, as here, there was nothing among the assets of the deceased that at law or in equity belonged to the claimant, and the damages which had been done to him were unliquidated and uncertain, the executors of the wrongdoer could not be sued merely because his estate might have benefited by the wrong complained of; that the damages claimed were none the less unliquidated and uncertain from the fact that the claimant might be able to prove that the measure of his damages was the amount of the purchase-money paid for the shares, and that, for these reasons, the claim could not be allowed. *In re* DUNCAN. TERRY *v.* SWEETING
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3. —— *Retainer—Right of—Administration to Creditor—Decree for Administration—Form of Administration Bond.*

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Nunn v. *Barlow*, (1824) 1 S. & S. 588, examined and followed.

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Timson v. *Ramsbottom*, (1837) 2 Keen, 35, and *In re Hall*, (1880) 7 L. R. Ir. 180, distinguished.

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Although under ordinary circumstances a creditor proving in a bankruptcy may properly lump together his debts and securities, yet when the debts are distinct in substance, with different rights over as against third persons, or with different securities, the trustee in the bankruptcy may insist that proof shall not be made for a lump sum, and may require the creditor to distinguish and specify the particular debts and the values of the securities for the same respectively.

A bank were the indorsees of four bills of exchange, of which A and C were drawn by one person, and B and D by another person, upon different acceptors, to the order of the same payee, who indorsed them all to the same firm. That firm indorsed them to another firm, who indorsed them to the bank. The first-mentioned firm executed a creditor's deed, which provided for the distribution of their assets as in bankruptcy. The bank proved under the deed for the aggregate amount of the four bills, and, by means of dividends under the deed and payments by the other persons liable upon the bills, they received in respect of the bills B and D more than 20*s.* in the pound, but they had not yet received payment in full of the other two bills A and C. The whole amount which they had received was less than the total amount due on all the four bills:—

Held, that the trustee of the deed was entitled to have the bills B and D delivered up to him, and to have the surplus above 20*s.* in the pound which the bank had received in respect of each of those bills handed over to him.

Decision of Romer J., [1898] 2 Ch. 413, affirmed. *In re* MORRIS. JAMES *v.* LONDON AND COUNTY BANKING COMPANY - - C. A. 485

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The test whether a mortgage of a building and fixtures requires registration under the Bills of Sale Act as respects the fixtures, laid down by *Ex parte Barclay*, (1874) L. R. 9 Ch. 576, namely, that it depends on whether the deed gives power to the mortgagee to sell or take possession of the fixtures separately from the building, is not limited to leaseholds, but is equally applicable to a mortgage of freeholds, notwithstanding that in the latter case fixtures might be deemed to pass as part of the fee simple. JOHNS *v.* WARE Romer J. 359

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—— *Courtenay* v. *Williams*, (1844) 3 Hare, 539, discussed - - - - 726
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—— *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409, referred to - - - - 255
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—— *Dunraven (Earl)* v. *Llewellyn*, (1850) 19 L. J. (Q.B.) 388, 392; S. C. 15 Q. B. 791, observed upon - - 241
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—— *Greville* v. *Browne*, (1859) 7 H. L. C. 689, followed - - - - 554
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—— *Hall, In re*, (1880) 7 L. R. Ir. 180, distinguished - - - - 163
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—— *Hopkinson* v. *Rolt*, (1861) 9 H. L. C. 514, referred to - - - - 132
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—— *Jones* v. *Evans*, (1876) 2 Ch. 4. 420, distinguished - - - - 602
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—— *Kearns* v. *Leaf*, (1864) 1 H. & M. 681, principle applied - - - 16
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—— *Kelly* v. *Batchelar*, (1893) 10 Rep. Pat. Cas. 289, distinguished - - - 807
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—— *Kent* v. *Freehold Land Co.*, (1868) L. R. 3 Ch. 493, discussed - - 770
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—— *Knott* v. *Cottee*, (1852) 16 Beav. 77, followed, except as to the rate of interest - 674
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—— *Lewis* v. *Lewis*, (1871) L. R. 13 Eq. 218, observed upon - - - 316
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—— *Lucas* v. *James*, (1849) 7 Hare, 410, 418, followed - - - - 879
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—— *Luthins* v. *Leigh*, (1734) Cas. t. Tal. 53, rule in, applied - - - - 365
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—— *Lyons (J.) & Sons* v. *Wilkins*, [1896] 1 Ch. 811, approved - - - 255
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—— *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467, referred to - - - 622
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—— *Marcus, Re*, (1887) 57 L. T. 399, principles of, applied - - - - 764
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—— *Marshfield, In re*, (1887) 34 Ch. D. 721, followed - - - - 726
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—— *Mason* v. *Broadbent*, (1863) 33 Beav. 296, discussed - - - - 726
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—— *Mostyn* v. *Mostyn*, [1893] 3 Ch. 376, distinguished - - - - 611
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—— *North Australian Territory Co.* v. *Goldsborough, Mort & Co.*, [1893] 2 Ch. 381, followed - - - - 47
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—— *Parbury's Case*, [1896] 1 Ch. 100, distinguished - - - - 414
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—— *Patten* v. *Bond*, (1889) 60 L. T. 583, followed - - - - 353
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—— *Phillips* v. *Hudson*, (1867) L. R. 2 Ch. 243, distinguished - - - 241
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—— *Porcher* v. *Wilson*, (1866) 14 W. R. 1011, followed - - - - 365
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—— *Reynish* v. *Martin*, (1746) 3 Atk. 330, distinguished - - - - **63**
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—— *Rhodes* v. *Rhodes*, (1859) 27 Beav. 413, 417, considered - - - - **703**
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—— *Richards* v. *Morgan*, (1863) 4 B. & S. 641, observed upon - - - **241**
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—— *Richardson* v. *Richardson*, [1895] P. 276, affirmed on appeal, [1895] P. 346, dicta, in adopted - - - - **853**
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—— *Ridgeway* v. *Munkittrick*, (1841) 1 D. & War. 84, 93, considered - - - **703**
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—— *Robinson* v. *Barton-Eccles Local Board*, (1883) 8 App. Cas. 798, applicable **537**
See LOCAL GOVERNMENT. 3.

—— *Scottish Petroleum Co., In re*, (1883) 23 Ch. D. 413, observed upon - **770**
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—— *Smith* v. *Smith*, (1860) 10 Ir. Ch. Rep. 89 & 461, not followed - - - **365**
See WILL. 7.

—— *Soutar's Policy Trust, In re*, (1884) 26 Ch. D. 236, not followed - - - **38**
See HUSBAND AND WIFE.

—— *Stedman* v. *Hart*, (1854) Kay, 607, distinguished - - - - **72**
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—— *Stroud* v. *Lawson*, [1898] 2 Q. B. 44, followed - - - - **55**
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—— *Sturla* v. *Freccia*, (1880) 5 App. Cas. 623, referred to - - - - **241**
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—— *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, (1875) L. R. 7 H. L. 697, considered - - **583**
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—— *Timson* v. *Ramsbottom*, (1837) 2 Keen, 35, distinguished - - - **163**
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—— *Tomlinson, In re*, [1898] 1 Ch. 232, differed from - - - - - **821**
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—— *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, applicable - **474**
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—— *Turnbull, In re*, [1897] 2 Ch. 415, followed **38**
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—— *Van Grutten* v. *Foxwell*, [1897] A. C. 658, distinguished - - - **554**
See WILL. 2.

—— *Walter* v. *Selfe*, (1851) 4 De G. & Sm. 315, referred to - - - - **255**
See TRADE UNION.

—— *Ward* v. *Duncombe*, [1893] A. C. 369, discussed - - - - **163**
See ASSIGNMENT.

—— *Warren's Trusts, In re*, (1884) 26 Ch. D. 208, 216, followed - - - **703**
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—— *Warrick* v. *Queen's College, Oxford*, (1871) L. R. 6 Ch. 716, observed upon - **241**
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—— *White* v. *Baker*, (1860) 2 D. F. & J. 55, distinguished - - - - **642**
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CHARGE—Judgment debt—Legal remainder—Receiver—"Actual delivery in execution" - - - - **465**
See JUDGMENT DEBT.

—— Real estate with debts and legacies — Tenant for life—Power of sale - **554**
See WILL. 2.

CHARITY — "*Ecclesiastical Charity*" — *Parish Council—Appointment of Trustees—Churchwarden Trustees—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 14, *sub-ss.* 1, 2; *ss.* 70, 75, *sub-s.* 2.

The founder of an eleemosynary charity by her deed of endowment declared that the objects of the charity should be selected by the trustees thereof (one of whom was to be the rector of the parish) from amongst poor men and women resident in a certain parish who should have (1.) regularly attended divine service in the church of the parish for a fixed period, (2.) been partakers of the Holy Communion, (3.) lived a godly, righteous, and sober life to the glory of God's Holy Name; and she also declared that the lay trustees should always be members of the Church of England:—

Held, that the charity was one for the benefit of members of the Church of England "as such," i.e., in their character of members of that Church, and to the exclusion of non-members thereof, and was accordingly an ecclesiastical charity within s. 75 of the Local Government Act, 1894; and held, therefore, that the parish council had no power, under s. 14, sub-s. 1, of the same Act, to appoint trustees of it.

In s. 75, sub-s. 2 (*e*), of the Act of 1894, the words "or otherwise for the benefit of any particular Church . . . . or any members thereof as such" are not to be construed as limited to religious "benefit," to the exclusion of mere temporal benefit.

There may be a charity in the legal sense for purposes which are both eleemosynary and ecclesiastical or religious.

The decision of Stirling J., [1898] 1 Ch. 391, affirmed.

A testatrix by her will (made in 1799) devised a rent-charge to be paid to the churchwardens for the time being of the parish of B. H. on a certain day in every year for ever, and to be laid out in the purchase of garments to be given to "six old and poor widows of the said parish whom they shall judge the properest objects to receive the same with preference to those who not being disabled by infirmity or sickness are most constant in their attendance on the public service of the church."

Held, first, that the charity thus created was not an ecclesiastical charity within the meaning of the Local Government Act, 1894; and, secondly, that s. 14, sub-s. 2, of that Act had application to the case of a non-ecclesiastical charity, the only trustees of which were churchwardens, and

CHARITY—*continued.*
accordingly that the parish council had power to appoint trustees of such a charity in place of the churchwardens.

The decision of North J., [1897] 2 Ch. 397, affirmed. *In re* PERRY ALMSHOUSES. *In re* ROSS' CHARITY - - - - - - **C. A. 21**

CHILDREN—Several gifts restricted to — Unqualified gift — Gifts to issue—Canon of construction - - - 703
See WILL. 6.

CHOSE IN ACTION—Priority—Notice to existing trustees—Death or retirement of trustees - - - - 163
See ASSIGNMENT.

CHURCHWARDEN—Trustees — "Ecclesiastical charity" — Parish council — Appointment of trustees - - - 21
See CHARITY.

CHURCHYARD — Consecration — Ground "adjoining" to an existing churchyard—Intervening highway - - 559
See ECCLESIASTICAL LAW.

CLASS — Different classes of shareholders — Separate general meetings of each class —Quorum - - - - 115
See COMPANY. 4.

CLOG—On equity of redemption—Notice to pay off principal - - - 747
See MORTGAGE. 1.

CODICIL — Republication — Gift to attesting witness—Solicitor—Profit costs - 764
See WILL. 1.

COMMON—*Commonable Rights — Agreement for Sale—Action for Specific Performance—Counterclaim—Finding of Jury on Trial of Issue of Fact —Motion for New Trial—Evidence—Admissibility —Reputation—Deposition in Suit to perpetuate Testimony—Survey and Report as to Manor made under Statute.*

In an action in the Chancery Division by a statutory committee of commoners for specific performance of an agreement to purchase commonable rights, an order was made directing the trial before a jury in the Queen's Bench Division of the following issue of fact, namely, whether a certain piece of land was common land or subject to any commonable rights either of the commoners of the parish of C., or of the commoners of the parish of L. :—

Held, that evidence of reputation was admissible on the trial of such an issue.

Earl Dunraven v. *Llewellyn*, (1850) 19 L. J. (Q.B.) 388, 392; S. C. 15 Q. B. 791, and *Warrick* v. *Queen's College, Oxford*, (1871) L. R. 6 Ch. 716, observed upon.

A deposition made in the year 1815, in a suit to perpetuate testimony by a witness examined on commission on behalf of a predecessor in title of the defendants, was admitted in evidence at the trial of this issue as being a statement made by a person vouched by the party on whose behalf the deponent was examined, and consequently an admission by conduct of a predecessor in title of the defendants. This deposition had been sealed

COMMON—*continued.*
up by the examiners, but was now found unsealed :—

Held, that the mere fact that the deposition was now found to be unsealed was not evidence of user or adoption by the party on whose behalf the deponent was examined, and that, in the absence of evidence of such user or adoption, the deposition was inadmissible on the ground on which it was admitted.

Richards v. *Morgan*, (1863) 4 B. & S. 641, observed upon.

A survey and report made by a surveyor in 1816, in discharge of a duty imposed upon him by the 8th section of the statute 34 Geo. 3, c. 75, upon the occasion of a sale of Crown lands, and produced out of the proper custody, is admissible in evidence as a public document within the decision in *Sturla* v. *Freccia*, (1880) 5 App. Cas. 623. *Phillips* v. *Hudson*, (1867) L. R. 2 Ch. 243, distinguished. EVANS *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL - - **C. A. 241**

COMPANY—*Articles of Association—Construction —"Place of Profit" — "Under" — Incapable of Acting as a Director.*

A trustee of a covering deed relating to debentures issued by a company, who was nominated and paid by the company, *held* to be the holder of a "place of profit under the company," and therefore incapable of acting as a director. ASTLEY *v.* NEW TIVOLI, LIMITED **North J. 151**

2. —— *Contract—Filing of Memorandum in lieu of Contract—Practice—Procedure—Application for Relief — Rectifying Register—Motion—Summons—Shareholders, Application by some only —Forms of Order and Memorandum—Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

An application under the Companies Act, 1898, s. 1, for leave to file a contract or a memorandum in lieu of a contract, may be made either by motion or summons, but preferably by summons, and if by summons it should be heard in open Court and not in chambers, following the better practice on applications to rectify the register of shareholders.

The application, if made by shareholders, may be made by some only, and not necessarily by all, of the shareholders affected.

Where a memorandum in lieu of a contract is approved by the Court and ordered to be filed with the Registrar of Joint Stock Companies under sub-s. 4, it is not necessary to file a copy of the order as well as the memorandum, but the memorandum should state on the face of it that it has been approved by the Court and directed to be filed by the order.

Forms of order and memorandum under the Act. *In re* WHITEFRIARS FINANCIAL COMPANY. *In re* REEVES & SON, LIMITED **Kekewich J. 184**

3. —— *Director — Qualification Shares — Remuneration — Apportionment — Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35).

The articles of association of a company limited by shares provided as follows : "(80.) The qualification of a director shall be the holding of shares of the company of the nominal amount of 250*l.* A first director may act before acquiring his qualification, but shall in any case acquire

the same within one month from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly. (81.) The board shall be entitled to receive by way of remuneration in each year 5000*l.* Such remuneration shall be divided among the directors in such proportions and manner as they shall from time to time agree, or in default of agreement, equally. (92.) The office of a director shall be vacated . . . . (*c*) if he cease to hold the due qualification." N. was one of the first directors, and from June, 1896, to November, 1897 (when the company went into liquidation), he attended eight meetings of the board of directors. He did not acquire any shares within a month of his appointment; but in March, 1897, he acquired twenty-five shares of 10*l.* each, not from the company, but from its promoter. The directors never agreed as to the proportions in which the remuneration was to be divided amongst them:—

Held, that the agreement by N. to serve the company on the terms of the articles as to qualification and otherwise, and the agreement by the company to remunerate him, were cross and not interdependent contracts; that N. could not "cease" to hold a qualification which he never possessed; that as a member of the board he was nevertheless entitled to remuneration; but that he could only claim his share of the remuneration for one year, against which must be set off the 250*l.* due from him to the company for the qualification shares which he had agreed to take.
SALTON *v.* NEW BEESTON CYCLE COMPANY
Cozens-Hardy J. 775

4. —— *Meetings—Articles of Association—Different Classes of Shareholders—Separate General Meetings of each Class—Quorum.*

The articles of a limited company whose capital was divided into different classes of shares provided (art. 13) that any agreement modifying the rights attached to each class must be confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class, and "all the provisions hereinafter contained as to general meetings shall, mutatis mutandis, apply to every such meeting, but so that the quorum thereof shall be members holding or representing three-fourths of the nominal amount of the issued shares of the class." The subsequent provisions as to general meetings provided (inter alia) (art. 66) that the quorum thereat should be members personally present, not being less than three in number, holding or representing one-tenth of the issued capital of the company; and (art. 68) that if at an adjourned meeting a quorum was not present those members who were present should be a quorum. These articles were said to be in the common form:—

Held (affirming the decision of Kekewich J.), that although the provisions as to general meetings were to apply, mutatis mutandis, to class meetings, they must be so applied subject to the provision above quoted, which was inserted in art. 13 for the purpose of protecting the rights of the privileged class of shareholders; and accordingly at all class meetings, whether adjourned or not, the quorum must be three-fourths of the members of the class required by art. 13.
HEMANS *v.* HOTCHKISS ORDNANCE COMPANY
C. A. 115

5. —— *Meetings — Shareholder — General Meeting—Notice—Irregularity — Special Resolutions—Directors' Interest—Non-disclosure—Conditional Notice.*

The notice of an extraordinary general meeting must disclose all facts necessary to enable the shareholder receiving it to determine in his own interest whether or not he ought to attend the meeting; and pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose.

Kaye v. *Croydon Tramways Co.*, [1898] 1 Ch. 358, followed.

A notice of two meetings to be held in immediate succession to consider seriatim two alternative resolutions, one at each meeting, is not rendered an invalid notice of the second meeting by an express provision that it will only be held in the event of the first resolution not being passed at the first meeting.

Alexander v. *Simpson*, (1889) 43 Ch. D. 139, distinguished.
TIESSEN *v.* HENDERSON
Kekewich J. 861

6. —— *Prospectus—Directors—Statement that Directors will take shares not taken by Vendor—Estoppel—Implied Agreement.*

The prospectus of a company, approved and issued by the directors after the registration of the company, and inviting subscriptions for the preference shares and debenture capital, stated that the directors would take all the ordinary shares which were not taken by the vendors to the company. The vendors (who were two of the directors) and others took all the ordinary shares except 367. No ordinary shares were ever allotted to any of the other directors, and none of those directors was ever placed on the register of shareholders in respect of any ordinary shares. In the winding-up of the company, there being no evidence, except the prospectus, of any agreement between the company and one of the non-vendor directors that he should take any ordinary shares:—

Held, that the prospectus was not satisfactory proof of an agreement binding the company to allot and the director to accept such shares, and that he was not liable in respect of any ordinary shares, either on the ground of agreement or on the ground of estoppel.

Decision of Wright J. reversed. *In re* MOORE BROTHERS & CO. - - - **C. A. 627**

7. —— *Shares — Issue of fully paid-up Original Shares at a Discount—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 60 *—Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 21—*Companies Clauses Act*, 1869 (32 & 33 *Vict. c.* 48), *s.* 5.

A company governed by the Companies Clauses Consolidation Act, 1845, and the Acts amending it, may issue fully paid-up original shares at a sum less than their nominal amount in the same manner as new shares can under the

COMPANY—*continued.*

authority of those Acts be issued. STATHAM *v.* BRIGHTON MARINE PALACE AND PIER COMPANY
Romer J. 199

8. —— *Shares—Payment in Cash—Contract in Writing—Omission to File—"Inadvertence"—Sufficiency—Supplemental Contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-ss.* 1, 4.

By a contract in writing dated October 18, 1897, the owner of a business agreed to sell it to a company for a specified sum of money to be paid wholly or partly in cash, shares, or debentures as the directors should determine. Subsequently the directors allotted specified shares to the vendor as fully paid up in respect of a part of the purchase-money, but no written contract to that effect was entered into. The original contract was not filed as required by s. 25 of the Companies Act, 1867, the omission to file it being due to the fact that the parties were ignorant of the provisions of the Act. Upon an application by the vendor for an order for the filing of the original contract with the Registrar of Joint Stock Companies under the provisions of s. 1 of the Companies Act, 1898:—

Held, that the omission to file the contract was due to "inadvertence" within the meaning of the Act:

Held, however, that the contract was not sufficient within the meaning of the Act, inasmuch as the determination by the directors as to the mode in which payment was to be made was supplemental to the original contract, and without this determination there was no complete contract:

Held, therefore, that there must be an order that a supplemental contract be entered into, that the supplemental contract be filed with the original contract, and that the entire contract when so filed should operate as if it had been filed at the time of the issuing of the shares. *In re* JACKSON & CO., LIMITED - Kekewich J. 348

9. —— *Shares—Signatory to Memorandum of Association for* 6500 *Shares—Sale of Business by Signatory for* 6500*l. payable by* 6500 *fully paid-up Shares—Same Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1, *sub-ss.* 1 *and* 4.

A company was formed to take over the business carried on by J. J. signed the memorandum of association for 6500 shares of 1*l.* each. The company was registered on October 4, 1897; on October 8 a contract in writing between J. and the company was executed, whereby J. agreed to sell his business to the company in consideration of 6500*l.* payable by the allotment to him of 6500 fully paid-up shares of 1*l.* each in the company. The 6500 shares were duly allotted to J. under the contract. No other shares other than those were ever applied for by or allotted to J., and there was evidence to shew that the 6500 shares for which J. signed the memorandum of association were considered by all parties to be the same 6500 shares issuable to him under the contract, and that J. did not intend by so signing the memorandum of association to render himself liable to take any shares other than the 6500 mentioned in the contract:—

COMPANY—*continued.*

Held, on motion made under s. 1, sub-ss. 1 and 4, of the Companies Act, 1898, for an order for filing a fresh contract in writing, or in the alternative for filing a memorandum specifying the consideration for which the shares were issued, that the case was not within the Act, that the contract filed under s. 25 of the Act of 1867 was a proper and sufficient contract, and that the object of the application was not to get rid of any liability under that contract, but to obtain indirectly the decision of the Court whether or not J. was under some liability in respect of the shares for which he signed the memorandum of association, and that it was not contemplated by the Act of 1898 that it should be used for the decision of such a question, and the motion was refused. *In re* F. W. JARVIS & CO., LIMITED
Romer J. 193

10. —— *Shares issued as Fully Paid—Sufficiency of Filed Contract—Statement of Consideration—Certificates of Shares—Estoppel—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

In order to comply with s. 25 of the Companies Act, 1867, it is not necessary that within the four corners of the filed contract there should be a complete identification of the property other than cash which is the consideration given for the shares therein referred to, provided the filed contract states plainly the nature of the consideration, and supplies the means of identification by reference to an unfiled contract which contains a full description of the consideration.

Observations on *In re S. Frost & Co.*, [1898] 2 Ch. 556.

In 1892, O., M., and D. and another being the owners of mining rights in African land, all of them except O. gave O. a power of attorney authorizing him to sell their interests to a company to be formed to take over the property for fully paid shares. In 1894 the same persons handed the title deeds to a purchaser from O. In 1895 M. and D. received certificates of shares in the A. Company stating that the nominal amounts of the shares had been paid in full. They kept the certificates and obtained a dividend on the shares. In the meantime O. without their knowledge had formed the H. Syndicate to take over the property and resell it at an enhanced price to a trustee for the then intended and afterwards formed A. Company, which took over the property and issued the shares. M. and D. (without their knowledge) took their shares as nominees of the H. Syndicate.

Before the issue of the shares two contracts, dated December 12 and December 19, 1894, were filed with the Registrar of Joint Stock Companies. That of December 12 was between the syndicate as vendors and the A. Company, and provided for the issue of shares (including those of M. and D.) to be treated as fully paid up "as mentioned in an agreement dated December 6, 1894," and also provided that "in consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement." It also confirmed the prior agreement which had on

COMPANY—*continued.*

December 6 been made between the syndicate and the trustee for the intended company, and fully identified the property, but which was never filed. The agreement of December 19 was between the syndicate and the company; and thereby, in consideration of the syndicate agreeing to give the company immediate possession of "the lands and premises situate in the mining district of Millwood, in Cape Colony, of South Africa, more particularly mentioned and referred to in an agreement dated December 6, 1894, and made between" &c. (stating the names of the parties), the company agreed to allot to the syndicate or their nominees shares (including those of M. and D.) in the company which were to be deemed to be fully paid.

M. and D. knew nothing of any contracts having been filed until in the winding-up of the company the liquidator sought to have them declared the holders of shares on which nothing had been paid:—

Held, that although the contract of December 12 might not be sufficient to protect the shares under s. 25 of the Companies Act, 1867, the contract of December 19 was sufficient.

But *semble*, that if no sufficient contract within the Act of 1867 had been filed before the issue of the shares, the statement in the certificates that the shares issued to M. and D. were fully paid would not have estopped the company or its liquidator from (*a*) denying that the shares were fully paid in cash—because M. and D. knew they were to get vendors' shares not paid for in cash, and did not rely on the certificate as a statement that cash had been paid; or (*b*) denying the filing or sufficiency of a contract in respect of the shares.

Burkinshaw v. *Nicolls*, (1878) 3 App. Cas. 1004, *Parbury's Case*, [1896] 1 Ch. 100, and *Bloomenthal* v. *Ford*, [1897] A. C. 156, distinguished.

Semble, however, that if the filed contracts had been insufficient the case would have been one in which relief would properly have been granted under the Companies Act, 1898. *In re* African Gold Concessions and Development Company. Markham and Darter's Case **Wright J. 414**

11. —— *Unauthorized Borrowing — Money applied in Payment of Debts of Company—Subrogation of Lender to Rights of Creditors—Secured Creditors.*

A railway company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, A having priority over B and C, and B over C. They had issued the whole of these stocks, and had no other borrowing power. Not having the funds to pay a half-year's interest on the debenture stocks, they borrowed money from their bankers for the purpose, the bankers paying the interest warrants of the stockholders when presented to them. Soon after this had been done a judgment creditor of the company presented a petition under the Railway Companies Act, 1867, and a receiver was appointed under the petition. The receiver had in his hands moneys sufficient to pay the next half-year's interest due to the A stockholders and to pay in part the interest for the same half-year due to the B stockholders:—

Held, that the bankers were not entitled, in respect of the moneys advanced by them and applied in paying the interest due to the debenture stockholders, to the benefit of the securities and priorities of those stockholders or any of them, but that they were only entitled, so far as the moneys advanced had been applied in discharging legal debts or liabilities of the company, to stand in the same position as if the advance had been a valid one.

Where a company borrows money ultra vires, the lender, so far as the money is applied in the discharge of legal debts and liabilities of the company, is entitled to have the loan treated as valid, but he is not subrogated to any securities or priorities of the creditors who are paid by means of his money.

Decisions of Romer J., [1898] 2 Ch. 663; [1899] 1 Ch. 205, affirmed. *In re* Wrexham, Mold and Connah's Quay Railway Company **C. A. 440**

12. —— *Voting—Evidence—Articles of Association.*

An article provided that votes tendered at a meeting and not disallowed at the meeting or an adjournment thereof should be valid for all purposes:—

Held, that in the absence of fraud or mala fides a resolution for voluntary winding-up could not be impeached upon the ground that votes had been improperly received. Wall *v.* London and Northern Assets Corporation - **North J. 550**

13. —— *Winding-up — Contributory — Misrepresentation — Rescission of Contract to take Shares—Proceedings commenced between Petition and Order for Winding-up.*

Notwithstanding the observations of Lord Westbury in *Reese River Silver Mining Co.* v. *Smith*, (1869) L. R. 4 H. L. 64, 77, 78, there is nothing in that case throwing doubt on the decision of Lord Cairns L.C. in *Kent* v. *Freehold Land Co.*, (1868) L. R. 3 Ch. 493, that a shareholder cannot be relieved from liability on his shares on the ground of misrepresentation in an action or proceeding commenced after the presentation of a winding-up petition, but before the order for winding-up on that petition is made.

Where an affidavit, in opposition to an application for final judgment under the Rules of the Supreme Court, 1883, Order xiv., in an action by the company for calls, setting up misrepresentation as a defence, and stating an intention to counter-claim for rescission on that ground, was followed by an order giving leave to defend, and all these matters occurred before the presentation of a winding-up petition, but the counter-claim for rescission was delivered after the petition and before the winding-up order made upon it:—

Held, that the shareholder was too late to apply for relief.

Observations on *In re Scottish Petroleum Co.*, (1883) 23 Ch. D. 413. *In re* General Railway Syndicate. Whiteley's Case **Wright J. 770**

14. —— *Winding-up — Contributory — Shareholder—Omission to File Contract—Relief—Com-*

panies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

Relief under the Companies Act, 1898, may be refused on the ground of matter of prejudice although it does not amount to bad faith, or gross negligence, or illegal conduct on the part of the applicant for relief.

R. sold his business to a company of which he was to be governing director. There was a written agreement for the sale of the business which provided that the consideration for the sale should be satisfied by the allotment to R.—nothing being said about his nominees—of certain fully paid shares in the company, and this agreement was filed with the Registrar of Joint Stock Companies before the shares were issued.

S. & B. agreed with R. to help him to dispose of the shares by circulating the company's prospectus amongst their customers, with personal letters recommending the shares, on the terms of receiving, as nominees of R., 200 of his fully paid shares, and a sum of 6*d.* on each share applied for on their recommendation. Shares not forming part of the shares mentioned in the agreement were afterwards allotted to S. & B. as fully paid. It was not shewn that S. & B. made any inquiry except from R. as to the truth of the prospectus (which in the opinion of the Court omitted to state the most material part of the real contract) or as to the value of the shares. In the winding-up of the company S. & B. were placed and retained on the list of contributories:—

Held, that S. & B.'s application for relief under the Act of 1898 must be refused. *In re* Roxburghe Press. Spiers & Bevan's Case

Wright J. 210

15. —— *Winding-up—Examination—Private Examination — Subsequent Proceedings against Examinee—Inspection of Deposition—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies (Winding-up) Rule, Nov.*, 1895.

In December, 1897, in the winding-up of a company, D., one of its directors, was examined under s. 115 of the Companies Act, 1862. In March, 1898, the liquidator in the name of the company commenced an action against the directors, including D., for alleged misfeasances, and in this action interrogatories were administered for the examination of D. Before answering, D. applied in the winding-up for liberty to inspect and take an office copy of the deposition taken at his private examination. He had already put in a full defence to the statement of claim, and offered to give an undertaking to use his best endeavours to prevent the communication of the deposition to the other defendants, or their solicitors or counsel:—

Held, that leave to inspect and take a copy of the deposition ought to be granted. *In re* Merchants' Fire Office - Wright J. 432

16. —— *Winding-up—Official Receiver—Report of—Sufficiency—Finding of Fraud—Order for Public Examination — Jurisdiction — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8—*Motion to Discharge Order for Public Examination — Time — Rules of the Supreme Court, Order* LVIII., *r.* 15.

To enable the Court to make an order, under

sub-s. 3 of s. 8 of the Companies (Winding-up) Act, 1890, for the public examination of a person who is alleged to have taken part in the promotion or formation of a company in liquidation, the further report of the official receiver under sub-s. 2 must not only state that that person had taken part in the promotion or formation, and that, in the opinion of the official receiver, fraud had been committed by him in the promotion or formation, but must also state facts shewing a basis for the official receiver's opinion, and warranting the judge in calling upon the person implicated for an explanation.

Observations as to the proper mode of framing the report.

Order of Wright J. affirmed.

Per Wright J.: Notice of motion to discharge an ex parte order for public examination under sub-s. 3 ought to be given within a reasonably short time.

Whether the time for giving such a notice is fixed by Order LVIII., r. 15, of the Rules of the Supreme Court, *quære*. *In re* Civil, Naval and Military Outfitters, Limited - C. A. 215

17. —— *Winding-up — Proof — Fully paid Shares taken in Payment of Debt—Failure of Consideration—Creditor—Payment or Satisfaction of Debt.*

A creditor of a company for a sum partly secured by debentures of the company and partly unsecured surrendered the debentures to the company upon the terms of the company giving him new debentures for a smaller amount and fully paid-up shares for the balance (secured and unsecured) of the debt, and he had the shares registered in the name of a trustee. In the winding up of the company some of the shares were held to be unpaid. The trustee, having been settled on the list of contributories in respect of the unpaid shares, took an assignment of the debt, and claimed to prove for the amount due on the shares:—

Held, that to the extent of the unpaid shares there had been no payment or satisfaction of the debt, and that the trustee was not precluded by being a member of the company from taking an assignment of the debt and proving for the unpaid balance. *In re* Railway Time Tables Publishing Company. *Ex parte* Welton.

C. A. 108

18. —— *Winding-up — Surplus Assets — Articles of Association.*

The regulations of a company with a nominal capital in 1*l.* shares provided that if upon the winding-up the surplus assets should be more than sufficient to repay the whole paid-up capital, the excess should be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding-up. Some of the shares issued were fully paid up; on others only 10*s.* per share had been paid. There was an excess in the winding-up after paying debts and expenses and repaying all the paid-up capital:—

Held, that the excess was distributable in proportion to the capital actually paid up. *In re Anglo-Continental Corporation of Western*

COMPANY—*continued.*
Australia, [1898] 1 Ch. 327, distinguished. *In re* MUTOSCOPE AND BIOGRAPH SYNDICATE
Wright J. 896

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CONVEYANCING AND LAW OF PROPERTY—Sale by order of the Court—Purchaser for value without notice - - 611
See VENDOR AND PURCHASER. 1.

COPYRIGHT—*Music—Infringement—"Sheet of Music"—Perforated Roll of Paper for Use in Mechanical Organ—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 15.

The defendants sold for use in a mechanical wind instrument called an "Æolian" perforated rolls of paper which represented the instrumental music of certain songs in the music of which the plaintiffs had the copyright. The rolls were inserted in the instrument, and were unrolled by its action, and the passage of air through the slots in the rolls into the pipes of the instrument produced musical sounds the pitch and duration of which were determined by the position and length of the slots. The instrument also contained stops, swells, and pedals, whereby variations of time and expression could be effected at the will of the performer; and in the margin of some of the rolls there appeared directions as to time and expression which were also to be found in the plaintiffs' songs:—

Held, that the paper rolls, so far as they contained perforations, were part of the instrument, and were not sheets of music within the Copyright Act, 1842; but *held*, that the addition of the directions as to time and expression was an infringement of the plaintiffs' copyright. BOOSEY *v.* WRIGHT - - - Stirling J. 836

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ECCLESIASTICAL LAW — *Churchyard — Consecration — Ground "adjoining" to an existing Churchyard—Intervening Highway—Consecration of Churchyards Act*, 1867 (30 & 31 *Vict. c.* 133).

Land may adjoin and may be added to an existing churchyard within the meaning of the Consecration of Churchyards Act, 1867, although it is separated therefrom by a highway.

A plot of ground separated from a churchyard by a highway about twenty feet wide was held to be "adjoining to an existing churchyard" within the meaning of the Act. *In re* BARONESS BATEMAN AND PARKER'S CONTRACT
Kekewich J. 599

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FRAUDS, STATUTE OF—*Part Performance—Agreement for Lease—Increased Rent—Payment of Rent—Parol Evidence.*

A landlord having verbally agreed with his yearly tenants to grant them a lease for twenty-one years of the messuage held by them (without the inclusion in the lease of any additional property) at an increased rent, the tenants for some time afterwards paid the increased rent:—

Held, that the decision in *Nunn* v. *Fabian*, (1865) L. R. 1 Ch. 35 (as explained by Baggallay L.J. in *Humphreys* v. *Green*, (1882) 10 Q. B. D. 148, 156), applied, notwithstanding anything laid down in *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467; that the payment of rent was a sufficient part performance to take the case out of the Statute of Frauds; and that parol evidence of the agreement was therefore admissible. MILLER & ALDWORTH, LIMITED *v.* SHARP
Byrne J. 622

FRAUDULENT CONVEYANCE — *Protection of Creditors—Voluntary Assignment of Policy of Assurance — Investment of Policy Moneys by Assignee — Creditors' Administration Action — Following Assets*—13 *Eliz. c.* 5.

A testator voluntarily assigned two policies of assurance to his niece, who on the death of the testator, which happened shortly afterwards, received the policy moneys and invested them with other moneys of her own upon mortgage. The testator's estate proved to be insolvent. In a creditors' administration action the validity of these assignments was impeached under 13 Eliz. c. 5, and the plaintiffs moved for an order for payment into court of the policy moneys, or for a receiver:—

Held, that, if the fund existed in specie, it would be assets of the testator, assuming the assignments to be within the Statute of Elizabeth, and the Court would have jurisdiction to secure the fund for the benefit of the creditors

FRAUDULENT CONVEYANCE—*continued.*

until the determination of that question; and that there had been no such alteration in the nature of the fund as to oust the jurisdiction of the Court, the fund being still in the hands and under the control of the assignee, although not in its original shape; and, accordingly, the Court exacted an undertaking from the assignee not to receive the moneys secured by the mortgages, so far as they represented the policy moneys, and not to deal with the mortgages except with the sanction of the Court. *In re* MOUAT. KINGSTON COTTON MILLS COMPANY *v.* MOUAT - - - - Stirling J. 831

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GIFT—By Will.
See Cases under WILL.

—— Equitable assignment — Banker's deposit receipt — Indorsement and delivery — Donee appointed executor - 408
See VOLUNTARY GIFT.

GLEBE—*Contract for Sale by Vicar—Entry by Purchaser—Payment of Interest on Purchase-money—Non-payment of Principal—Ecclesiastical Commissioners—Action by—Specific Performance — Vendor's Lien — Ecclesiastical Leasing Acts*, 1842 (5 *&* 6 *Vict. c.* 108) *and* 1858 (21 *&* 22 *Vict. c.* 57).

In 1873 a vicar, with the approval of the Ecclesiastical Commissioners and with the consent of the patron of his living, agreed to sell the glebe lands of the vicarage under the powers of the Ecclesiastical Leasing Acts, 1842 and 1858, for 24,963*l.* to the trustee of a settled estate who had power to invest trust funds in the purchase of land.

The contract was entered into with the consent of the then tenant for life of the settled estate, and the Ecclesiastical Commissioners were parties to and executed it.

The title was accepted, and the then tenant for life entered into possession, and paid the vicar interest on the purchase-money. The vicar died, the estate devolved, and payment of the interest (which was more than an investment of the purchase-money would have produced) was continued by the tenant for life for the time being to the vicar for the time being until 1896, when, the purchase-money being still unpaid, the Ecclesiastical Commissioners brought an action against the present vicar, the tenant for life, and the legal personal representatives of the trustee, for specific performance of the contract and damages, or an account and a declaration that they were entitled to a lien on the lands and to enforcement thereof:—

Held, that it was the duty of the plaintiffs to see that the powers given by the Ecclesiastical Leasing Acts were properly applied, and that they had good ground of action.

The judgment of Bigham J., sitting for Byrne J., reversed. ECCLESIASTICAL COMMISSIONERS *v.* PINNEY - - C. A. 99

GOODWILL — Death of one partner — Sale of business to surviving partner—"Effects and securities" - - - 378
See PARTNERSHIP. 1.

—— Public-house — Mortgage — Real Estate Charges Act - - - 316
See MORTGAGE. 5.

GREENHOUSE — Ancient Lights — Prescription —"Building"—Injunction - 698
See LIGHT.

GUARDIAN—Maintenance—Education—Bringing up—Immoral home—Breach of trust Control of Court - - - 719
See INFANT. 3.

—— Protestant parents—Mother surviving sole guardian — Re-marriage of mother — Roman Catholic husband - - 526
See INFANT. 2.

HIGHWAY — Intervening — Consecration — Ground "adjoining" to an existing churchyard - - - - 599
See ECCLESIASTICAL LAW.

HOUSE OF LORDS—Costs—Liability of pauper appellant—Solicitor and client - 853
See PRACTICE. 3.

HUSBAND AND WIFE—*Policy by Husband for Benefit of Wife—Petition for Appointment of Trustees — Title of Petition — Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10.

A widow, whose husband died in 1898, petitioned for the appointment of trustees to receive payment of the money secured by a policy of assurance effected by him in 1874, under the Married Women's Property Act, 1870, and expressed to be for her benefit:—

Held, that the petition was properly entitled only in the matter of the Act of 1870.

In re Soutar's Policy Trust, (1884) 26 Ch. D. 236, not followed.

In re Adam's Policy Trusts, (1883) 23 Ch. D. 525; 48 L. T. 727, and the opinion expressed by Stirling J. in *In re Turnbull*, [1897] 2 Ch. 415, followed. *In re* KUYPER'S POLICY TRUSTS
North J. 38

—— Married woman — Liability of appointed fund to debt - - - 666
See POWER. 2.

—— Receiver—Appointment—Married woman —Jurisdiction - - - 16
See PRACTICE. 10.

ILLEGALITY—Consideration for settlement—Marriage with sister of deceased wife
See SETTLEMENT. 811

IMMORALITY — Maintenance — Education — Bringing up—Immoral home—Breach of trust—Trustee's discretion—Control of Court - - - - 719
See INFANT. 3.

INCLOSURE—*Manorial Rights—Reservation of Mines—Working Powers.*

Under an Inclosure Act, part of a common was allotted to the lord of the manor, in compensation for his right to the soil of the common, and the residue to the commoners; and the Act provided that nothing therein contained should prejudice the right of the lord to the royalties incident to the common, but that he and all persons claiming under him should at all times thereafter hold and enjoy the mines and other royalties "in as full ample and beneficial manner to all intents and purposes as he or they could or might have held and enjoyed the same in case this Act had not been made," provided always that in case the owner for the time being of the royalties, or any person claiming under him, should work any mines lying under any of the allotments, the person working the same should make reasonable satisfaction for the damage and spoil of the ground to the person for the time being in possession of such ground:—

Held, that the Act conferred on the owner for the time being of the mines, as incident to the enjoyment thereof, all usual working powers, which included the right of sinking shafts on any of the allotments for the purpose of winning and carrying away minerals under any part of the common.

Bell v. *Love*, (1883) 10 Q. B. D. 547; (1884) 9 App. Cas. 286, discussed. HAYLES *v.* PEASE AND PARTNERS, LIMITED - Stirling J. 567

INFANT—*Costs—Practice—Jurisdiction—Infant Defendant ordered to pay Costs.*

Where an injunction was granted to restrain an infant defendant from representing that the business carried on by him was connected with the business carried on by the plaintiff:—

Held, that the Court had jurisdiction to order the infant defendant to pay the costs of the action.

Chubb v. *Griffiths*, (1865) 35 Beav. 127, and *Lemprière* v. *Lange*, (1879) 12 Ch. D. 675, followed. WOOLF *v.* WOOLF - Kekewich J. 343

2. —— *Guardianship—Protestant Parents — Mother surviving Sole Guardian—Remarriage of Mother—Roman Catholic Husband—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 2—*Discretion of the Court.*

Under the Guardianship of Infants Act, 1886, where there is no guardian appointed by the father in existence, the mother, if surviving the father, is entitled to be the sole guardian of an infant child of the marriage; and although the Court has power in such case, both under the Act and of its own jurisdiction, to appoint a guardian to act jointly with the mother, the fact that the mother has married a second husband of a faith different to that which she professes and in which the infant is being educated, is not of itself sufficient to justify the exercise of the power, so long as there is no personal misconduct or interference with the proper bringing up of the infant.

The Court will only interfere where it is shewn that, having regard to the real benefit of the infant, it ought to do so.

Appeal from Kekewich J. allowed. *In re* X. X. *v.* Y. - - - - C. A. 526

3. —— *Maintenance — Education — Bringing up—Immoral Home—Trustee's Discretion—Control of Court — Breach of Trust — Guardian — Schoolmistress—Landlord of Lodgings.*

A trustee who, in pursuance of a trust to

INFANT—*continued.*
maintain, educate, and bring up infants, brings them up in an immoral home, commits a breach of trust.

Bequest of a fund to a wife during her widowhood, "she maintaining, educating, and bringing up" the testator's unmarried infant sons and unmarried daughters. The widow, while duly maintaining and educating the children, lived in adultery with a married man in the home she provided for them:—

Held, that this was a breach of the trust imposed on her, and that the Court could administer the fund.

Castle v. *Castle*, (1857) 1 De G. & J. 352, followed. *In re* G. (INFANTS) - **Kekewich J. 719**

—— Payment out of court—Infants domiciled in France—French law—Right of father to receive children's money - - - **712**
See PRACTICE. 9.

INFRINGEMENT—Repair or reconstruction of patented article—Injunction - **807**
See PATENT. 2.

—— "Sheet of music"—Perforated roll of paper for use in mechanical organ - **836**
See COPYRIGHT.

INJUNCTION—Ancient lights—Prescription—Greenhouse—"Building" - **698**
See LIGHT.

—— Mandatory—Form of—Pulling down buildings—Practice - - - **438**
See BUILDINGS.

—— Mandatory—Illegal breaking up of street—Local authority—Extent of ownership
See LONDON. 2. **474**

—— Patent—Infringement—Repair or reconstruction of patented article - **807**
See PATENT. 2.

—— Picketing—"Watching and besetting"—"Wrongfully and without legal authority" - - - - **255**
See TRADE UNION.

INN—Mortgage—Goodwill of business—Real Estate Charges Act - - **316**
See MORTGAGE. 5.

INSPECTION—Deposition—Private examination—Subsequent proceedings against examinee - - - - **432**
See COMPANY. 15.

INSURANCE, FIRE—Equitable tenant for life—Liability—Covenants—Repairs - **821**
See TENANT FOR LIFE.

INSURANCE, LIFE—Mortgagee taking possession of real estate—Redemption action—Right to redeem policy separately **175**
See MORTGAGE. 6.

INTEREST—Arrears of—Mortgage of reversion **726**
See TENANT FOR LIFE AND REMAINDERMAN.

—— Rate of—Breach of trust—Accumulation clause—Wilful default—Compound interest - - - - **674**
See TRUSTEE. 1.

INTERLOCUTORY APPLICATION—Costs—Solicitor and client—Appeal—Corporation—Negligence - - - **1**
See PRACTICE. 2.

INTERNATIONAL LAW — *Conflict of Laws—Foreign Judgment—Divorce—Procedure—Irregularity—Recognition by English Court.*

A judgment or decree pronounced by the Court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign Court had jurisdiction over the subject-matter and over the persons brought before it, and the proceedings do not offend against English views of substantial justice.

Thus, where a decree for divorce had been pronounced by the proper Court in Florida in an undefended action by the husband against the wife on the ground of her violent and ungovernable temper, both the parties being domiciled and resident in Florida, an alleged irregularity in service of process was held not to be a ground for questioning the validity of that decree in an action brought by the wife in the English Courts to enforce a claim arising out of her alleged second marriage to a British subject.

Decision of Kekewich J. reversed. PEMBERTON *v.* HUGHES - - - - **C. A. 781**

INVESTMENT—Personal security—Consent of tenant for life—Loan to tenant for life
See TRUSTEE. 3. **593**

IRREGULARITY—Foreign judgment—Divorce—Recognition by English Court—Conflict of laws - - - - **781**
See INTERNATIONAL LAW.

—— Notice of general meeting—Directors' interest—Non-disclosure - - **861**
See COMPANY. 5.

ISSUE — Gifts to—Several gifts restricted to children—Unqualified gift—Canon of construction - - - **703**
See WILL. 6.

ISSUE OF SHARES—At a discount - **199**
See COMPANY. 7.

JOINDER—Parties—Joint and separate causes of action - - - - **55**
See PRACTICE. 5.

—— Separate causes of action—Same defendants
See PRACTICE. 7. **393**

JUDGMENT DEBT — *Charge on Land—Legal Remainder—Receiver—Equitable Execution—"Actual Delivery in Execution"—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 13—*Judgments Act*, 1864 (27 & 28 *Vict. c.* 112), *ss.* 1, 4—*Practice—Sale—Summons—Petition—Rules of the Supreme Court, Order* LV., *r.* 9 B.

A judgment debt is not enforceable as a charge against the judgment debtor's legal remainder in real estate: nor does an order obtained by the judgment creditor appointing a receiver constitute an "actual delivery in execution" within s. 1 of the Judgments Act, 1864, entitling the creditor to a sale of the remainder under s. 4.

Decision of North J. affirmed.

Per North J.: An application by a judgment

JUDGMENT DEBT—*continued.*
creditor for a sale under s. 4 of the Judgments Act, 1864, for the recovery of his debt, is now more properly made by summons and not by petition: Rules of the Supreme Court, Order LV., r. 9 B. *In re* HARRISON AND BOTTOMLEY **C. A. 465**

JUDICIAL TRUSTEES ACT, 1896—Breach of trust—Relief of trustees from personal liability under s. 3 - - - - **797**
See TRUSTEE. 2.

JURISDICTION—Infant defendant ordered to pay costs - - - - - **343**
See INFANT. 1.

—— Lunatic trustee—Appointment of new trustees—Vesting order - - **79**
See LUNACY. 2.

—— Payment out of court—Infants domiciled in France—French law—Right of father to receive children's money - **712**
See PRACTICE. 9.

—— Receiver—Appointment—Married woman
See PRACTICE. 10. **16**

—— Report of official receiver—Sufficiency—Finding of fraud—Order for public examination - - - **215**
See COMPANY. 16.

LACHES—Bonâ fide sale to solicitor—Action to set aside - - - - **873**
See MORTGAGE. 3.

LANDLORD AND TENANT—*Lease—Option to Purchase—"Assigns"—Equitable Assignee—Possession.*

The equitable assignee of a lease who has omitted to perfect his title by a legal assignment, although in possession of the premises and paying the rent reserved by the lease, is not entitled to the benefit of an option to purchase given to the lessee, his executors, administrators, and assigns.

In a covenant giving an option to purchase, the word "assigns" means the persons entitled to the term as between them and the lessor, and to the benefit of the covenants entered into by the lessor and lessee respectively which run with the land demised. FRIARY HOLROYD AND HEALEY'S BREWERIES, LIMITED *v.* SINGLETON **Romer J. 86**

LEASE—Agreement for—Part performance—Payment of rent—Parol evidence **622**
See FRAUDS, STATUTE OF.

—— Ecclesiastical leasing—Glebe lands—Contract for sale by vicar—Non-payment of principal—Vendor's lien - - **99**
See GLEBE.

—— Option to purchase—"Assigns"—Equitable assignee—Possession - **86**
See LANDLORD AND TENANT.

—— Reversioner—Privity of estate—Incorporeal hereditament—Rent - - **656**
See WAY-LEAVE.

LEGACY.
See Cases under WILL.

LIABILITY—Breach of trust—Relief of trustees from personal liability under s. 3 of the Judicial Trustees Act, 1896 - **797**
See TRUSTEE. 2.

—— Director—Prospectus—Untrue statements—Repudiation after action brought—Reasonable public notice - - **393**
See PRACTICE. 7.

—— Equitable tenant for life—Covenants—Repairs—Insurance - - **821**
See TENANT FOR LIFE.

—— Pauper appellant—Costs—House of Lords—Solicitor and client - - **853**
See PRACTICE. 3.

—— To render cash account—No costs claimed by solicitor - - - **818**
See SOLICITOR. 1.

LIEN—Glebe lands—Contract for sale by vicar—Non-payment of principal—Vendor's lien - - - - - **99**
See GLEBE.

LIFE INSURANCE—Mortgagee taking possession of real estate—Redemption action—Right to redeem policy separately **175**
See MORTGAGE. 6.

LIGHT—*Ancient Lights—Prescription—Greenhouse—"Building"—Injunction—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

A greenhouse is a "building" within s. 3 of the Prescription Act (2 & 3 Will. 4, c. 71), and therefore, if it has ancient lights, may be protected by injunction against interference with the access of light.

Harris v. *De Pinna*, (1886) 33 Ch. D. 238, considered. CLIFFORD *v.* HOLT **Kekewich J. 698**

LIMITATIONS, STATUTE OF—Mortgagor barred by lapse of time—Redemption action—Right to redeem policy separately **175**
See MORTGAGE. 6.

—— Pauper—Maintenance - - **72**
See LUNACY. 1.

—— Statute-barred debt—Retainer - **726**
See TENANT FOR LIFE AND REMAINDERMAN.

LOAN—To tenant for life—Investment clause—Personal security—Consent of tenant for life - - - - - **593**
See TRUSTEE. 3.

LOCAL GOVERNMENT—*Privies and Water-closets—Local Authority—Powers—Substitution of Water-closet for Privy—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

By s. 36 of the Public Health Act, 1875, if a house within the district of a local authority appears to such authority, by the report of their inspector of nuisances, "to be without a sufficient water-closet, earth-closet or privy, and an ashpit furnished with proper doors and coverings," the local authority are directed to give notice to the owner or occupier of the house requiring him "to provide a sufficient water-closet, earth-closet or privy, and an ashpit furnished as aforesaid, or either of them, as the case may require":—

Held, that a local authority had power under this section, upon being satisfied that a house within their district was without a sufficient

LOCAL GOVERNMENT—*continued.*

privy, to require the owner (subject to his right to appeal to the Local Government Board under s. 268) to provide a sufficient water-closet in the place of the existing privy. NICHOLL *v.* URBAN DISTRICT COUNCIL OF EPPING - **Stirling J. 844**

2. —— *Street—Paving, &c., Expenses—Apportionment—Alteration of Scheme—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8, 11, 12, 13.

An urban authority resolved to do certain paving, &c., works under the Private Street Works Act, 1892, with respect to a street in their district, and by a further resolution approved their surveyor's specification, plans, and provisional apportionment of expenses, comprising the whole of the street. One of the owners objected to the apportionment on the ground that part of the street was repairable by the inhabitants at large. The justices allowed the objection, and amended the plans and provisional apportionment by limiting them to the remaining portion of the street, without, however, directing any notice of the amendment to be given to the other owners. Another owner, who had had no notice of the amendment, declined to pay his apportioned share of the expenses on the ground (1.) that it was for the urban authority to determine whether the works should extend to the whole or part of the street; (2.) that he had been deprived by the action of the justices of the opportunity of objecting to the amended scheme. Upon an application by the urban authority for a charge on his premises:—

Held, (1.) that the justices in limiting the scheme to a portion of the street had acted within their jurisdiction, and that the amended scheme took effect as though it had been approved ab initio by the urban authority; (2.) that it was not necessary that any further notices should be given to the owners, unless the justices in the exercise of their discretion so directed; and the Court granted the application. TWICKENHAM URBAN DISTRICT COUNCIL *v.* MUNTON

Stirling J. 168

3. —— *Street—Width of—"New Street"—Local Authority—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 63.

Held, that the decision of the House of Lords in *Robinson* v. *Local Board of Barton-Eccles*, (1883) 8 App. Cas. 798, as to the meaning of the term "new streets" in s. 157 of the Public Health Act, 1875, governs the construction of the same term in s. 63 of the Towns Improvement Clauses Act, 1847.

A country lane in the neighbourhood of a town, and situate within the district of the urban district council of that town, was defined for the greater part of its length (581 yards) by hedges. On one side of it were buildings, extending for 485 feet along the lane, belonging to brickmakers, who were proposing to erect on the other side of the lane, opposite to their existing buildings, new buildings, which would extend for 233 feet along the lane:—

Held, that by the erection of these new buildings the lane between them and the old buildings opposite would become a "new street" within the meaning of s. 63 of the Towns Improvement

LOCAL GOVERNMENT—*continued.*

Clauses Act, 1847, and subject to the provisions of that section as to width.

An interlocutory injunction was accordingly granted to restrain the defendants (the brickmakers) from building so as to make or lay out the lane as a new street less than thirty feet wide. ATTORNEY-GENERAL *v.* RUFFORD & Co.

North J. 537

—— "Ecclesiastical charity"—Parish council—Appointment of trustees—Churchwarden trustees - - - - **21**

See CHARITY.

LONDON—*Building Owner—Party Wall—Notice—Sufficiency—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90.

A party-wall notice, given by a building owner to an adjoining owner under s. 90 of the London Building Act, 1894, ought to be so clear and intelligible as to enable the adjoining owner to see what counter-notice he should give under the provisions of the Act. HOBBS, HART & Co. *v.* GROVER - - - - **C. A. 11**

2. —— *Streets—Vesting of—Subsoil—Extent of Ownership—Local Authority—Illegal Breaking Up of Street—Mandatory Injunction—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 96.

Held, that the decision of the House of Lords in *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, as to the extent to which the soil of a street is vested in a local authority, under s. 149 of the Public Health Act, 1875, applies to the similar vesting in a local authority under s. 96 of the Metropolis Management Act, 1855, so that the soil of a street is vested in a vestry under s. 96 only so far "as is necessary for the control, protection and maintenance of the street as a highway for public use."

An electric lighting company had illegally broken up the surface of a street within the district of a vestry in the metropolis, and placed their pipes and wires at a depth of about two feet below the surface:—

Held, that the vestry were not by virtue of s. 96 the owners of the soil of the street at that depth, and that, although the company had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the company to remove their pipes and wires, there being no continuing trespass upon or interference with any right of the vestry.

Decision of Jeune P. (to whom the above case was not cited) reversed. BATTERSEA VESTRY *v.* COUNTY OF LONDON AND BRUSH PROVINCIAL ELECTRIC LIGHTING COMPANY - **C. A. 474**

LUMPING DEBTS AND SECURITIES—Proof—Bills of exchange - - - **485**

See BANKRUPTCY.

LUNACY—*Pauper — Maintenance — Limitations Act*, 1623 (21 *Jac.* 1, *c.* 16).

A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of the S. Union for sixteen years prior to her death in 1898. In 1895, the lunatic having become entitled to a fund, a receiver was appointed in Lunacy; and thereupon the guardians gave

LUNACY—*continued.*
notice of a claim for past and future maintenance to the Master in Lunacy, who replied that the claim would be borne in mind in dealing with the fund. The fund was, however, not recovered by the Lunacy authorities till after the death of the lunatic, and was afterwards transferred to the Chancery Division. In an action by the guardians against the legal personal representative of the lunatic for arrears of maintenance:—

Held, that the plaintiffs were entitled only to six years' arrears from the commencement of the action.

In re Newbegin's Estate, (1887) 36 Ch. D. 477, followed.

Stedman v. *Hart*, (1854) Kay, 607, distinguished. *In re* WATSON. GUARDIANS OF STAMFORD UNION *v.* BARTLETT - - Stirling J. 72

2. —— *Practice — Jurisdiction — Lunatic Trustee—Appointment of New Trustees—Vesting Order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116-119, 133-143, 342—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25-41.

The High Court has jurisdiction under the Trustee Act, 1893, to appoint a new trustee in the place of a sole surviving trustee who is a lunatic not so found.

The High Court has not jurisdiction in such a case to make a vesting order.

Semble, where a vesting order is required, resort should be had to the Lunacy jurisdiction. *In re* M. - - - - Stirling J. 79

MAINTENANCE — Education — Bringing up—Immoral home — Breach of trust — Trustee's discretion—Control of Court
See INFANT. 3. 719

—— Pauper—Limitations Act - - 72
See LUNACY. 1.

MANDATORY INJUNCTION—Form of—Pulling down buildings—Practice - 438
See BUILDINGS.

—— Illegal breaking up of street—Local authority—Extent of ownership - 474
See LONDON. 2.

MANOR — Mines — Reservation of — Working powers—Manorial rights - - 567
See INCLOSURE.

MARRIAGE—Deceased wife's sister—Settlement—Illegality - - - - 811
See SETTLEMENT.

—— Restraint of — Condition — Marriage with consent—Alternative bequest - 63
See WILL. 3.

MARRIED WOMAN—General power of appointment—Liability of appointed fund to debts - - - - 666
See POWER. 2.

—— Policy by husband for benefit of wife—Appointment of trustees—Title of petition - - - - - 38
See HUSBAND AND WIFE.

—— Receiver—Appointment—Jurisdiction 16
See PRACTICE. 10.

MARSH LANDS — Depreciation of — Waste by tenant for life—Damages - - 726
See TENANT FOR LIFE AND REMAINDERMAN.

MARSHALLING—Mortgage estate — Pecuniary legatee and annuitants—Priorities 365
See WILL. 7.

MAXIM OF LAW—"Actio personalis moritur cum personâ"—Claim for damages for misrepresentation - - - 387
See ADMINISTRATION. 1.

MEETINGS—Notice—Irregularity—Special resolutions — Directors' interest — Non-disclosure—Conditional notice - 861
See COMPANY. 5.

—— Quorum—Different classes of shareholders — Separate general meetings of each class - - - - - 115
See COMPANY. 4.

MEMORANDUM OF ASSOCIATION — Sale of business by signatory to memorandum of association - - - 193
See COMPANY. 9.

MERGER—Mortgages - - - 353
See MORTGAGE. 7.

METROPOLIS MANAGEMENT ACTS—Streets—Vesting of—Subsoil—Extent of ownership - - - - - 474
See LONDON. 2.

MIDDLESEX—Purchase of lands in—Registration—Costs—Taxation—"Completion of conveyance" - - - 121
See SOLICITOR. 2.

MINES—Reservation of mines—Working powers—Manorial rights - - - 567
See INCLOSURE.

MISREPRESENTATION—By vendor's agent — Rescission — Noise — Nuisance — Boys' school - - - - 92
See VENDOR AND PURCHASER. 2.

—— Claim for damages for—Wrongful act done by deceased person—"Actio personalis moritur cum personâ" - - - 387
See ADMINISTRATION. 1.

—— Contributory—Rescission of contract to take shares—Proceedings commenced between petition and order for winding up of company - - - - 770
See COMPANY. 13.

—— From use of the words "trade mark" — Unregistered trade-mark - - 692
See TRADE-MARK.

—— Mortgages—Merger - - - 353
See MORTGAGE. 7.

MORTGAGE—*Clog on Equity of Redemption—Notice to Pay Off Principal.*

S., the sub-lessee of a theatre, had an option to acquire the reversion of the head-lease on paying 2000*l.* within a limited time. W. agreed to advance the money on the terms of the loan being repaid with 6 per cent. interest, and secured by a legal mortgage, which was also to provide

MORTGAGE—*continued.*

for payment to W. of one-third of the clear net profit rental of the theatre. The mortgage executed in pursuance of this agreement was for the whole of the term acquired by S. less one day, and contained a covenant by her for repayment of the 2000*l.* by twenty quarterly instalments of 100*l.* each (the payment of the last of which, if all had been duly paid, would have been more than four years before the end of the mortgage term), and also a covenant to pay the one-third of the profit rental during the whole of the mortgagor's term, although the 2000*l.* and interest had all been paid. The property was redeemable only on payment of 2000*l.* and interest, and all other moneys covenanted to be paid. Some of the instalments being in arrear, W. gave S. three months' notice to pay off all the principal moneys and interest secured by the mortgage. S. paid the instalments in arrear, and within the three months tendered the balance of the 2000*l.*, with interest to the end of the three months and the costs, but W. refused to accept the money:—

Held, (1.) that the stipulations for a share of the profit rental were an illegal clog on the equity of redemption, and (*a*) did not prevent S. from redeeming at the amount of her tender, and (*b*) did not enable W. to recover the share of profit rental; (2.) that W.'s notice requiring payment could not be withdrawn without the consent of S. SANTLEY *v.* WILDE - - - **Byrne J. 747**

2. —— *Foreclosure — Parties — Debenture-holders—"Floating Security."*

The trustees of a company, by its authority, gave a legal mortgage in fee of its land to the plaintiffs. Subsequently the company issued debentures to secure principal sums and interest which were thereby charged on all its undertaking and present and future property. It was also provided that the debentures were "all to rank pari passu in point of charge as a floating security on the property" thereby charged. The principal moneys thus charged were only to become payable in certain events, none of which had happened.

The plaintiffs commenced a foreclosure action to which they made not only the trustees and the company, but also all the debenture-holders defendants. At the trial it was objected on behalf of the debenture-holders that they were unnecessarily joined as parties:—

Held, that the debenture-holders had an immediate equitable charge; that the working out of a foreclosure decree in their absence was not a dealing with its property by the company in the ordinary course of its business; and that they were properly made parties to the action. WALLACE *v.* EVERSHED - **Cozens-Hardy J. 891**

3. —— *Power of Sale — Bonâ fide Sale to Solicitor—Action to Set Aside—Laches.*

In August, 1887, the executrix of the mortgagee of a reversionary interest employed E., a solicitor, to obtain probate of the mortgagee's will, and in October, 1887, E. being anxious to realize the mortgage, she asked E. to find a purchaser, when he reluctantly agreed that, if she or he could not find a purchaser by Christmas, he would buy. No purchaser was found, and in January, 1888, the executrix, in bonâ fide exercise of the power of sale contained in the mortgage, sold and conveyed the reversion to E. for more than its actuarial value. E. gave notice of his purchase to N., who had some time previously bought the equity of redemption, and who at once took legal advice as to his position and rights, but took no steps to set aside the transaction until ten years afterwards, when the reversion fell into possession:—

Held, (1.) that the sale could not be set aside, for that on the evidence E. was not acting as solicitor of the mortgagee at the time of the sale to himself; and (2.) that, even if E. did act as solicitor for the mortgagee in the matter of the sale, N. was barred by his laches and acquiescence. NUTT *v.* EASTON **Cozens-Hardy J. 873**

4. —— *Priority—Notice—Further Advances after Notice of Second Mortgage—Covenant to make Further Advances—Life Interest—Trust over on Alienation — Words of Futurity — Retrospective Operation — Voluntary Settlement by Mortgagor after Mortgage—Tacking.*

Held, by the Court of Appeal, that the doctrine of *Hopkinson* v. *Rolt*, (1861) 9 H. L. C. 514, that, after notice of a subsequent incumbrance, a first mortgagee cannot, as against that incumbrancer, tack to his debt further advances made by him to the mortgagor, applies to further advances made in pursuance of an obligation or covenant on the part of the first mortgagee entered into at the time of the first mortgage.

A settlement contained a trust for payment of the income of the trust fund to A. for life "or until he shall assign, charge or incumber, or affect to assign, charge or incumber" the same:—

Held, by the Court of Appeal, that under the circumstances this trust had not a retrospective operation so as to include past acts.

The owner of a life interest in personal estate, who had already mortgaged it, mortgaged it a second time to two persons, his uncles, who had no notice of the first mortgage. One of the conditions of the second mortgage was, that the mortgagor should make a settlement of his life interest, so that that interest should be made determinable on alienation by him, with a trust in that event for the application of the income, at the discretion of the trustees, for the maintenance, support or benefit of the settlor, his wife (if any) and children or remoter issue, and his sisters and their children or remoter issue, and a settlement to that effect was executed contemporaneously with the execution of the second mortgage. At the date of the second mortgage the first mortgagee had not given notice of his mortgage to the trustees of the will which created the life interest, and he did not give them notice until nine months afterwards, before which time notice of the second mortgage and of the settlement had been given to them. Notice of the first mortgage was given to the second mortgagees about five weeks after the notice to the trustees.

Held, by the Court of Appeal, that the uncles were entitled, in respect of their original advance and all further advances made by them to the nephew before they received notice of the first mortgage, to priority over the first mortgagee, but that the settlement must be treated as volun-

MORTGAGE—*continued.*
tary, and that the first mortgage was entitled to priority over it.

Decision of Kekewich J., [1898] 1 Ch. 488, reversed. WEST *v.* WILLIAMS - **C. A. 132**

5. —— *Public-house—Goodwill of Business—Real Estate Charges Act*, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113).

On August 12, 1871, a public-house, of which the mortgagor was the owner in fee, subject to a lease for thirty-one years from December 25, 1849, was mortgaged by him to secure 1507*l.* At this time the mortgagor was, as underlessee, occupying the house, and carrying on there the business of a licensed victualler. The goodwill of the business was not expressly included in the mortgage. On January 24, 1873, the original lease was surrendered to the mortgagor. He continued to carry on the business in the house until his death on November 20, 1873, and the business was afterwards carried on by the tenant for life under his will, until she died in 1897. The house and the goodwill were then sold by the trustee of the will (who had previously paid off the mortgage debt) for 11,550*l.*, of which 2617*l.* was apportioned as the value of the goodwill:—

Held, that, having regard to the existence of the lease, the goodwill did not pass to the mortgagee by the mortgage deed; that it did not accrue to him by the surrender of the lease; and that, as he had never taken possession, he had not acquired the goodwill de facto:

Held, therefore, that the mortgage debt must be borne by the residue of the purchase-money, after deducting the apportioned value of the goodwill.

Observations upon *Lewis* v. *Lewis*, (1871) L. R. 13 Eq. 218. *In re* BENNETT. CLARKE *v.* WHITE - - - - **North J. 316**

6. —— *Redemption Action — Real Estate — Life Policy—Mortgagee taking Possession of Real Estate—Statutory Title—Lapse of Time, Mortgagor barred by—Right to redeem Policy Separately—Analogy of Statute, Application of—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 7.

Where real estate and a life policy have been included in one mortgage to secure one indivisible sum, the mortgaged properties being subject to one and the same proviso for redemption, and the mortgagee has been in possession of the real estate for more than twelve years without any acknowledgment of the mortgagor's title, so that the mortgagor's right to redeem the real estate has become barred by s. 7 of the Real Property Limitation Act, 1874, his right to redeem the policy is also barred—not by analogy to the statute, but because, it having become impossible for the mortgagor to require a reconveyance of the real estate, it has become equally impossible, according to the rules regulating the administration of mortgages in a court of equity, for him to require a reassignment of the policy, the real estate and the policy together constituting one security for the debt. CHARTER *v.* WATSON **Kekewich J. 175**

7. —— *Two Properties—Mortgagor Trustee of one Beneficial Owner of other—Loan by Third Party on Promise to Transfer Mortgage—Misrepresentation—Part Payment to First Mortgagee with Money Lent—Second Mortgage of one Property only—Right of Second Mortgagee to a Charge on both Properties comprised in First Mortgage—Merger.*

C., being entitled as trustee for his wife to property X. and beneficially to property Y., mortgaged both properties, with the consent of his wife, to T. to secure 2000*l.* C. afterwards requested M. to lend him 1200*l.* to pay off an existing mortgage on X., promising to transfer the mortgage to him, but without disclosing the fact that X. belonged to his wife, or informing him of the amount of, or that Y. formed part of the security for, the first mortgage.

M. advanced the 1200*l.*, and C. applied 1000*l.* of that sum in paying off part of the 2000*l.* owing to T., and afterwards executed a mortgage of X. to M. to secure the 1200*l.* so advanced by him:—

Held, that when M. advanced the 1200*l.* on the above promise by C., and the 1000*l.* was applied in part payment to T., the charge on both X. and Y. was kept alive in equity in favour of M.

Patten v. *Bond*, (1889) 60 L. T. 583, followed.

Held, further, that M. did not lose the benefit of his charge by taking the equitable mortgage executed by C. on X., the charge thereby given not operating as a release or extinguishment of the prior charge and there being no reason for presuming a merger of the securities.

There is no merger at law even of a lower in a higher security if the remedy given by the latter is not co-extensive with that given by the former; *Bell* v. *Banks*, (1841) 3 Man. & G. 258. CHETWYND *v.* ALLEN - - **Romer J. 353**

—— By partner to secure debt of partnership—Devise of mortgagor's real estate — Sufficiency of partnership assets - **128**
See PARTNERSHIP. 2.

—— Mortgage estate devised free from incumbrances — Legatee and annuitants—Priorities - - - - **365**
See WILL. 7.

—— Reversion—Arrears of interest - **726**
See TENANT FOR LIFE AND REMAINDERMAN.

—— Trade machinery — Non-registration — Power of sale—Invalidity - **359**
See BILL OF SALE.

MOTION—Time—Motion to discharge order for public examination - - **215**
See COMPANY. 16.

MUSIC—Infringement of copyright—"Sheet of music"—Perforated roll of paper for use in mechanical organ - - **836**
See COPYRIGHT.

NEGLIGENCE — Corporation — Costs—Solicitor and client—Appeal - - **1**
See PRACTICE. 2.

NEWSPAPER — "*Publication*" — "*Sporting Paper.*"

A newspaper is published when and where it

NEWSPAPER—*continued.*
is offered to the public by the proprietor; it may be published in more than one place, and where its proprietor has two offices in two different towns, at each of which he offers for sale or distribution copies of his paper, the paper is published at each office.

On the sale of *Bell's Life in London* the vendors agreed with the purchaser not to print or publish any sporting paper within ten miles of a certain London street:—

Held, that the publication within this area of a paper containing no racing or betting odds, but merely recording such amateur sports as cricket, football, cycling, and running, was not a breach of the agreement. McFarlane *v.* Hulton
Cozens-Hardy J. 884

NOISE—Nuisance—Boys' school — Misrepresentation by vendor's agent—Rescission 92
See Vendor and Purchaser. 2.

NOTICE—Chose in action—Priority—Notice to existing trustees—Death or retirement of trustees - - - - 163
See Assignment.

—— Further advances after notice of second mortgage—Tacking—Priority - 132
See Mortgage. 4.

—— Irregularity—General meeting—Directors' interest — Non-disclosure — Conditional notice - - - - 861
See Company. 5.

—— Prospectus—Untrue statements—Repudiation after action brought—Reasonable public notice—Directors' liability 393
See Practice. 7.

—— Purchaser for value without—Sale by order of the Court - - - 611
See Vendor and Purchaser. 1.

—— Sufficiency—Building owner—Party-wall
See London. 1. 11

—— To pay off principal—Clog on equity of redemption - - - - 747
See Mortgage. 1.

NUISANCE—Noise—Boys' school—Misrepresentation by vendor's agent—Rescission 92
See Vendor and Purchaser. 2.

OFFICIAL RECEIVER—Report of—Sufficiency—Finding of fraud—Order for public examination - - - - 215
See Company. 16.

OPTION—To purchase — Lease — "Assigns"—Equitable assignee—Possession - 86
See Landlord and Tenant.

PARISH COUNCIL—"Ecclesiastical charity"—Appointment of trustees—Churchwarden trustees - - - - 21
See Charity.

PART PERFORMANCE—Agreement for lease—Payment for rent—Parol evidence 622
See Frauds, Statute of.

PARTICULARS—Of objections to patent—Costs—Shorthand notes—Practice - 803
See Patent. 3.

PARTIES — Foreclosure — Debenture-holders—"Floating security" - - 891
See Mortgage. 2.

—— Joinder of plaintiffs—Joint and separate causes of action - - - 55
See Practice. 5.

—— Representative action—Action on behalf of a class of the public - - 494
See Practice. 6.

PARTNERSHIP—*Dissolution—Goodwill — Death of one Partner—Sale of Business to surviving Partner—"Effects and Securities"—Carrying on Business under Style of old Firm—Canvassing old Customers—Appraiser—Partnership Articles.*

The law with regard to the disposal of goodwill on the dissolution of a partnership, and as to surviving or continuing partners' right to set up a rival business, discussed and explained.

L. and D. formerly carried on business as copartners under the style of L. & D. On the death of L. in 1876 D. and M. entered into partnership under articles whereby it was provided that the style of the firm should be the same as before—namely, L. & D.; and (amongst other things) that "in case of the death of one of the partners a general account of the position shall be made, including all effects and securities of whatsoever nature that they possess, and the value of such effects and securities be estimated as at the date of such decease." There was also a provision for the appointment of an appraiser.

The partnership expired by the death of D. in 1896, whereupon an appraiser was agreed upon between D.'s personal representative and M., who subsequently appointed the same person arbitrator.

Questions arose before the arbitrator whether he ought to consider the question of goodwill and set a value thereon, and whether in considering the goodwill he should appraise the value thereof on the footing that, if it were sold, M. would be at liberty to carry on a rival business, but without any right to solicit customers of the old firm, and whether or not under the name of L. & D. The arbitrator stated a special case for the opinion of the Court in accordance with s. 19 of the Arbitration Act, 1889:—

Held, that the arbitrator ought to consider the question of goodwill (if any), and to set such a value upon it as he might consider to have been attached to the business at the death of D., and that the value (if any) of the goodwill ought to be appraised on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit any person who was a customer of the old firm prior to the death of D., or the right to carry on business under the name of L. & D. *In re* An Arbitration between David and Matthews - - - - Romer J. 378

2. —— *Mortgage by Partner to secure Debt of Partnership—Devise of Mortgagor's Real Estate—Sufficiency of Partnership Assets—Real Estate Charges Act*, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113).

The Real Estate Charges Act, 1854 (Locke King's Act), does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership,

PARTNERSHIP—*continued.*

when at the time of his death the partnership assets are sufficient to answer all the debts of the partnership.

Decision of Romer J., [1898] 1 Ch. 667, affirmed. *In re* RITSON. RITSON *v.* RITSON **C. A. 128**

PARTY-WALL—Building owner—Notice—Sufficiency - - - - - **11**
See LONDON. 1.

PATENT—*Amendment of Specification—Pending Action or Proceeding for Revocation — "Disclaimer, Correction, or Explanation"—Patents, Designs, and Trade Marks Act*, 1883–1888 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *ss.* 18–20.

The word "disclaimer" in s. 19 of the Patents, Designs, and Trade Marks Act, 1883, must be read strictly, and not as including "correction or explanation."

Where, therefore, an action for infringement or proceeding for revocation of a patent is pending, the Court has no power under s. 19 to order that the patentee shall be at liberty to apply at the Patent Office for leave to amend his specification by way of correction or explanation.

Liberty to apply can only be given where the proposed amendment is by way of "disclaimer." *In re* OWEN'S PATENT **Stirling J. 157**

2. —— *Infringement—Injunction—Repair or Reconstruction of Patented Article—Article Manufactured at Request of Patentee's Agent.*

The plaintiffs under their patent manufactured a pneumatic tyre for cycles, which consisted of a rubber or elastic tyre lined in canvas in combination with two wires for securing the same to the rims of the wheels. The defendant, at the request of an agent of the plaintiff company, who brought him one of the plaintiffs' tyres, which was old and worn out, placed over the old wires a new canvas cover and a new rubber tyre. The agent had been sent by the plaintiffs to find out whether the defendant was infringing their patent, but there was nothing to shew that the agent was authorized by them to request the defendant to do what he did:—

Held, that what the defendant had done went beyond fair repair of the tyre, and amounted to its reconstruction, and that he had therefore infringed the plaintiffs' patent:

Held, also, that the plaintiffs were not estopped by the act of their agent from complaining of the infringement.

Kelly v. *Batchelar*, (1893) 10 Rep. Pat. Cas. 289, distinguished, on the ground that in that case the plaintiffs had authorized their agent to direct the defendant to construct an article infringing their patent.

Held, further, that, though only the one act of infringement by the defendant was proved, and there was no evidence of any threat by him to infringe again, yet, as he had accepted the order from the plaintiffs' agent in the ordinary course of his business, it must be assumed that he would accept similar orders again, if they were offered to him, and consequently that he must be restrained by injunction from infringing the patent. DUNLOP PNEUMATIC TYRE COMPANY *v.* NEAL - - - - **North J. 807**

PATENT—*continued.*

3. —— *Particulars of Objections — Costs — Shorthand Notes — Practice — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 6.

Particulars of an objection to a patent for want of novelty delivered by a defendant enumerated specifications of prior patents. The plaintiffs' patent was held novel, but bad for disconformity. The Court certified that the particulars of such of the specifications as had been of assistance in deciding the question of nonconformity were "reasonable and proper, without regard to the general costs of the case."

The cost of transcripts of shorthand notes of evidence for the purpose of appeal allowed. CASTNER KELLNER ALKALI COMPANY *v.* COMMERCIAL DEVELOPMENT CORPORATION - **C. A. 803**

PAUPER—Costs—House of Lords—Liability of pauper appellant—Solicitor and client
See PRACTICE. 3. **853**

—— Maintenance—Limitations Act - **72**
See LUNACY. 1.

PAVING—Street—Apportionment—Alteration of scheme - - - - **168**
See LOCAL GOVERNMENT. 2.

PAYMENT—Creditor—Proof—Fully-paid shares taken in payment of debt—Failure of consideration - - - **108**
See COMPANY. 17.

—— Part performance—Agreement for lease—Increased rent - - - **622**
See FRAUDS, STATUTE OF.

PAYMENT INTO COURT—Admission by defendant—Proceeds of sale of trust securities paid away by defendant - - **39**
See PRACTICE. 8.

PAYMENT OUT OF COURT—Infants domiciled in France—French law—Right of father to receive children's money **712**
See PRACTICE. 9.

PERPETUATING TESTIMONY—Deposition in suit—Evidence—Admissibility - **241**
See COMMON.

PETITION—Title of—Appointment of trustees—Policy by husband for benefit of wife
See HUSBAND AND WIFE. **38**

PICKETING—"Watching and besetting"—"Wrongfully and without legal authority"—Injunction - - - **255**
See TRADE UNION.

POLICY—By husband for benefit of wife—Appointment of trustees—Title of petition - - - - - **38**
See HUSBAND AND WIFE.

—— Mortgagee taking possession of real estate—Redemption action—Right to redeem policy separately - - - **175**
See MORTGAGE. 6.

POOR LAW—Pauper—Maintenance—Limitations Act - - - - **72**
See LUNACY. 1.

POWER—*Appointment—Exercise of Power—One-third to Son of Donee of Power—One-sixth to each of two Daughters—No Appointment of remaining*

POWER—*continued.*

Two-sixths—Will—"Wish them to pass directly to my said two Daughters"—Son not to share in "unappointed parts."

A testator bequeathed 15,000*l.* to trustees upon trust for J. B. for her life, and on her death in trust for her three children, H. B., J. W., and A. W., in such shares as J. B. should by will or codicil appoint, and in default of appointment in trust for her three children equally as tenants in common.

J. B., by a codicil to her will, appointed two-sixths of the fund in trust to pay the income to her son H. B. until he should assign, charge, or otherwise dispose thereof; and on such event happening, then in trust during his life, and after his death for his children (if any) as therein mentioned, and if no children in trust to be equally divided between all her children and grandchildren then living per capita; and she appointed one-sixth in trust for her daughter J. W. as therein mentioned, and one-sixth in trust for her daughter A. W. as therein mentioned, and declared as follows: "I make no appointment of the other two-sixth parts of the said sum of 15,000*l.*, as I wish them to pass directly to my said two daughters, so as to give them an immediate vested and disposable interest therein, and I also declare that neither my son nor his children (if any) shall take any share or interest in the said unappointed parts of the said trust funds":—

Held, that the last-mentioned two-sixth parts of the funds went as unappointed among the three children of J. B. *In re* JACK. JACK *v.* JACK
Romer J. 374

2. —— *Married Woman—General Power of Appointment—Exercise of Power—Liability of Appointed Fund to Debts—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 4.

A married woman had power, in the event of her husband surviving her, to appoint the income of a trust fund to him during his life. She had also, in the same event, a general power to appoint by will the capital of the fund as she should think fit. By her will she appointed out of the capital of the fund several sums, including 1100*l.* to D. "in satisfaction of a debt to that amount due from me to her." And she further appointed that (subject as aforesaid) the trustees should pay the whole of the income of the fund to her husband during his life. The husband survived her. There was in fact no debt due from her to D., but there was a debt of 1100*l.* due from her husband to D., and the evidence satisfied the Court that, in the appointment of the 1100*l.*, she intended to refer to that debt. She had at her death separate property applicable to the payment of her debts, but that property was insufficient for the purpose by more than 1100*l.* Some time after her death the husband paid the debt to D.:—

Held, that the appointment had not failed, but was effective, and that the 1100*l.* must be applied in payment of the debts of the testatrix. *In re* HODGSON. DARLEY *v.* HODGSON
North J. 666

3. —— *Special Power of Appointment—Bequest of Residue to Object of Power—Intention to Exercise—Construction of Will.*

Testatrix, who was entitled to a special power of appointment of a life interest in certain funds in favour of her husband, by her will, dated in 1882, gave legacies to persons not objects of the power out of her separate estate, or out of the estate and effects over which she had any disposing power, and then proceeded: "I give bequeath and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband absolutely." Testatrix had no other testamentary power of appointment. She died in 1883 leaving her husband her surviving:—

Held, that the power had been exercised. *In re* MILNER. BRAY *v.* MILNER Stirling J. 563

—— Investment—Personal security—Consent of tenant for life—Loan to tenant for life
See TRUSTEE. 3. 593

POWER OF SALE—Bonâ fide sale to solicitor—Action to set aside—Laches - 873
See MORTGAGE. 3.

—— Fetter on - - - - 331
See SETTLED LAND. 2.

—— Tenant for life—Undivided share in land
See SETTLED LAND. 4. 639

—— Trade machinery—Mortgage — Non-registration—Invalidity - - 359
See BILL OF SALE.

—— Trusts to pay or permit tenant for life to receive rents or profits—Vesting of legal estates - - - - 554
See WILL. 2.

PRACTICE—*Attachment—Order against Corporation—Disobedience—Enforcement by Attachment of Director—Service of Order—Rules of Supreme Court*, 1883, *Order* XLII., *r.* 31.

Obedience to an order made against a corporation will not be enforced, under rule 31 of Order XLII., by the attachment of a director of the corporation, unless the order has been served personally upon the director. MCKEOWN *v.* JOINT STOCK INSTITUTE, LIMITED - North J. 671

2. —— *Costs—Corporation—Statutory Powers—Negligence — Action — Injunction—Damages—Judgment—"Solicitor and Client"—Appeal—Interlocutory Application — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Act of Parliament—Title, Operation of.*

Sect. 1 of the Public Authorities Protection Act, 1893—which provides that, where in any action against any person for any act done in pursuance of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such act, duty or authority, a judgment is obtained by the defendant, it shall carry costs as between solicitor and client—applies to judgments in all actions in the Chancery Division for injunction or for damages, but not to appeals or interlocutory applications.

The title of an Act of Parliament is to be read as part of the enactments. FIELDING *v.* MORLEY CORPORATION - - - - C. A. 1

3. —— *Costs—House of Lord—Liability of Pauper Appellant—Solicitor and Client.*

Where an impecunious person is allowed to

PRACTICE—*continued.*

appeal to the House of Lords in formâ pauperis, the rules of the Supreme Court not being applicable, and there being no rules or practice of the House prescribing the assignment of a solicitor to a pauper appellant, or regulating the liability of such appellant for costs as between him and his solicitor, the contract between the pauper appellant and his solicitor must be taken to be the ordinary one, so that from the moment of the retainer of the solicitor by him, so long as the retainer holds good, although he has no means to pay, he is liable to pay costs in the same way as any other impecunious litigant who employed a solicitor would be liable.

Dicta of Sir F. Jeune in *Richardson* v. *Richardson*, [1895] P. 276, affirmed on appeal, [1895] P. 346, adopted. *In re* RAPHAEL. *Ex parte* SALOMON - - **Kekewich J. 853**

4. —— *Discovery—Production of Documents—Privilege—Accounts—Office Copy of Depositions.*

In an action against G. and her trustee in bankruptcy for breaches of trust committed by her as administratrix of her deceased husband's estate, the plaintiffs' solicitors had prepared certain accounts which were produced to her on examination before an examiner, and admitted by her to be correct. The action was afterwards compromised, and the depositions of G. to which the accounts were exhibited were entered as read in the order of compromise. The accounts related to transactions between G. and a firm of bankers with whom she had (in alleged breach of trust) deposited securities belonging to her husband's estate to secure advances to herself. In another action by the same plaintiffs against the bank, the defendants claimed production (1.) of the accounts, and (2.) of the office copy of G.'s depositions, both of which were in the plaintiffs' possession:—

Held, that the accounts were privileged, but the copy depositions was not.

North Australian Territory Co. v. *Goldsborough, Mort & Co.*, [1893] 2 Ch. 381, followed. GOLDSTONE *v.* WILLIAMS, DEACON & Co. **Stirling J. 47**

5. —— *Parties—Joinder of Plaintiffs—Joint and Separate Causes of Action—Rules of Supreme Court, Order XVI., r.* 1.

The plaintiffs, the two Universities of Oxford and Cambridge, claimed an injunction to restrain the defendants, who were publishers of educational and other works, from publishing and selling books or publications bearing the titles "The Oxford and Cambridge Publications" or "The Oxford and Cambridge Edition," and from using the words "Oxford and Cambridge," so as to lead to the belief that the publications of the defendants were publications of the Universities or of either of them, or issued from the University Presses. The defendants had published a series of books bearing the titles complained of by the plaintiffs:—

Held, that the action arose out of the same series of transactions; that common questions of fact would arise, namely, the fact of publication and the fact that a belief would be induced that the publications of the defendants were those of the plaintiffs; that, therefore, the conditions

PRACTICE—*continued.*

mentioned in *Stroud* v. *Lawson*, [1898] 2 Q. B. 44, as being necessary to bring a case within Order XVI., r. 1, were fulfilled; and that consequently the plaintiffs were entitled to join in one action. UNIVERSITIES OF OXFORD AND CAMBRIDGE *v.* GEORGE GILL & SONS - - **Stirling J. 55**

6. —— *Parties — Representative Action — Action on behalf of a Class of the Public—Rules of Supreme Court, Order XVI., r.* 9; *Order XXV., r.* 5.

The plaintiffs (six in number) sued on behalf of themselves and all other the growers of fruit, flowers, vegetables, roots and herbs, within the meaning of the Act for the Regulation of Covent Garden Market (9 Geo. 4, c. cxiii.), to enforce certain preferential rights to stands in the market, which they alleged to have been given to the class of growers by the Act. The sole defendant was the lord of the market:—

Held (Vaughan Williams L.J. dissenting), that there being a bonâ fide question as to the construction of the Act, the plaintiffs, as representing the class of growers, who had an interest in common, could maintain the action, but that the Attorney-General must be added as a defendant to represent the rest of the public who were interested in disputing the alleged preference:

Held, by Vaughan Williams L.J., that the growers had not a community of interest in the subject-matter of the action, but (agreeing with the rest of the Court) that, if the plaintiffs could maintain the action as representing a class, the Attorney-General must be made a party:

Decision of Romer J. reversed. ELLIS *v.* DUKE OF BEDFORD - - - - **C. A. 494**

7. —— *Parties—Separate Causes of Action—Same Defendants—Joinder of Plaintiffs—Rules of Supreme Court, Order XVI., r.* 1—*Company—Prospectus — Untrue Statements — Repudiation after Action brought—Reasonable Public Notice—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1 (*c*).

Four persons, each of whom separately took debentures on the faith of the statements in a prospectus and covering letter issued by the directors of a company, joined as co-plaintiffs in an action against the directors, claiming damages for misrepresentations contained in the prospectus and covering letter:—

Held, that, as the several causes of action were the same and arose out of the same transaction, and were against the same defendants, the action was properly constituted.

The Directors' Liability Act, 1890, s. 3, provides that where, after the passing of the Act, "a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, ... shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, ... unless it is proved . . . . that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its

PRACTICE—*continued.*

issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent."

A director of a company, being aware that a prospectus was being issued to the public inviting subscriptions for debentures, did not trouble to read it, abstained from inquiry as to its contents, and refrained from giving any notice under the Act. On action brought against him for damages for untrue statements in the prospectus:—

Held, that after action brought it was too late for him to repudiate the prospectus, and that he was liable.

Semble, repudiation of a prospectus by statement of defence is not "reasonable public notice" within the meaning of the Act. DRINCQBIER *v.* WOOD - - - - **Byrne J. 393**

8. —— *Payment into Court on Motion—Admission by Defendant—Proceeds of Sale of Trust Securities paid away by Defendant.*

In answer to an interlocutory motion that the defendant should pay into court money which arose from the sale of shares of which he had been a trustee for the plaintiff, but which he alleged (though the plaintiff denied it) that the plaintiff had given to him, the defendant admitted that he had received the proceeds of sale, and had transferred the shares to the purchasers. But he deposed: "Before any question was raised as to the transfers I in good faith paid away and disposed of all the purchase-money, in the belief that I was entitled thereto, and no part thereof is now in my hands, and I have no power over the shares or any of them":—

Held, that it was not shewn that the purchase-money was not under the defendant's control, and that he must be ordered to pay the amount into court. *In re* BENSON. ELLETSON *v.* PILLERS **North J. 39**

9. —— *Payment out of Court—Infants Domiciled in France—French Law—Right of Father to Receive Children's Money—Jurisdiction.*

Where infants who were French subjects and domiciled in France had become absolutely entitled to a fund in court, and it appeared that by the law of France their father as their legal guardian was entitled to receive and give legal discharges for all moneys coming to them during minority:—

Held, that the Court was not bound to pay out the fund to the father as of right, but that evidence ought to be adduced shewing that the fund would be applied for the benefit of the infants. *In re* CHÂTARD'S SETTLEMENT **Kekewich J. 712**

10. —— *Receiver — Appointment — Jurisdiction—Married Woman—Judgment for Costs "to be payable out of her Separate Property and not otherwise"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25.

An action by a married woman "suing in respect of her separate estate" was at the trial dismissed with costs, to be taxed and "payable out of her separate property, but not otherwise." The only separate property of the plaintiff consisted of a share coming to her under a will. Before the taxation of the defendants' costs had been completed by certificate, the trustees of the will being about to distribute their estate and

PRACTICE—*continued.*

pay the plaintiff her share, the defendants applied for the appointment of a receiver to receive the share and hold it as security for the costs when taxed:—

Held, by the Court of Appeal, that, on the principle of *Kearns* v. *Leaf*, (1864) 1 H. & M. 681, independently of s. 25 of the Judicature Act, 1873, there was jurisdiction to protect by injunction or the appointment of a receiver the fund out of which the costs were payable, and that a receiver ought to be appointed.

Decision of Kekewich J. affirmed. CUMMINS *v.* PERKINS - - - - **C. A. 16**

—— Costs—Infant defendant—Order to pay **343**
See INFANT. 1.

—— Costs—Shorthand notes—Particulars of objections - - - - **803**
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—— Filing of memorandum in lieu of contract —Application for relief - - **184**
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—— Mandatory injunction—Form of—Pulling down buildings - - - **438**
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—— Parties—Foreclosure—Debenture-holders—"Floating security" - - **891**
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PRESCRIPTION—Ancient lights—Greenhouse—"Building"—Injunction - - **698**
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PRIORITY—Chose in action—Reversionary trust fund — Notice to existing trustees — Death or retirement of trustees - **163**
See ASSIGNMENT.

—— Further advances after notice of second mortgage—Tacking - - **132**
See MORTGAGE. 4.

—— Mortgage estate devised free from incumbrances—Pecuniary legatee and annuitants—Marshalling - - **365**
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PRIVATE STREET WORKS ACT—Paving, &c., expenses—Apportionment — Alteration of scheme - - - - **168**
See LOCAL GOVERNMENT. 2.

PRIVITY OF ESTATE — Incorporeal hereditament—Royalty—Rent—Lease—Reversioner - - - - **656**
See WAY-LEAVE.

PRIVY—Substitution of water-closet for privy—Local authority—Powers - - **844**
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PRODUCTION OF DOCUMENTS — Discovery — Privilege - - - - **47**
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PROFIT COSTS — Solicitor — Gift to attesting witness—Codicil—Republication **764**
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PROOF—Bills of exchange—Lumping debts and securities - - - - **485**
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—— Fully paid shares taken in payment of debt —Failure of consideration - 108
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PROSPECTUS — Statement that directors will take shares not taken by vendor—Estoppel—Implied agreement - 627
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—— Untrue statements—Repudiation after action brought—Reasonable public notice 393
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PUBLIC—Action on behalf of a class of the public—Representative action—Parties
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PUBLIC AUTHORITIES PROTECTION—Costs—Solicitor and client—Appeal - 1
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PUBLIC HEALTH—Riparian owner—Consent—Stream—Interruption—Local authority —"Injuriously affecting" - 583
See WATERCOURSE.

—— Water-closet for privy—Substitution of—Local authority—Powers - - 844
See LOCAL GOVERNMENT. 1.

PUBLIC-HOUSE—Mortgage—Goodwill of business—Real Estate Charges Act - 316
See MORTGAGE. 5.

PUBLIC POLICY—Covenant in restraint of trade —Reasonable protection of covenantee
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PUBLICATION—"Sporting paper" - 884
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PURCHASER—Vendor and.
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—— Vendor and—Tenant for life—Undivided share in land—Power to sell - 639
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QUALIFICATION — Director — Shares — Remuneration—Apportionment - 775
See COMPANY. 3.

QUORUM—Different classes of shareholders—Separate general meetings of each class
See COMPANY. 4. 115

RAILWAY—*Debenture Stock—Interest on overdrawn Banker's Account—Subrogation.*

A railway company had by their Acts power to create and issue debenture stock of three classes, called respectively A, B, and C; and it was provided that the A debenture stock and interest should have priority over the B debenture stock and interest, and that the C stock should rank after the B stock. The interest on the several debenture stocks due August 1, 1897, was paid by the company's bankers, and by that means the company's account at the bank became largely overdrawn. On August 5, 1897, judgment was obtained against the railway company, and a receiver was appointed. The bank had no knowledge when allowing the overdraft that proceedings were pending against the company. It appeared from the books of the bank that so much of the overdraft was attributable to the payment of interest on the A stock, so much to that on the B stock, and so much to that on the C stock. There being money in the receiver's hands sufficient to pay the interest on the A stock, leaving a surplus available to pay the interest on the B stock, the bank claimed to be entitled, to the extent of the prior interest on the A stock paid off by them, to be subrogated to the rights of the A debenture stockholders, and to be paid in priority to the B debenture stockholders:—

Held, that the bank was not entitled to be paid any part of the money in the receiver's hands in priority to the B debenture stockholders,

Blackburn and District Benefit Building Society v. *Cunliffe, Brooks & Co.*, (1885) 29 Ch. D. 902, discussed and distinguished. *In re* WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY
Romer J. 205

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—— Mortgage by partner to secure debt of partnership—Sufficiency of partnership assets - - - - 128
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—— Public-house — Mortgage — Goodwill of business - - - - 316
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REAL PROPERTY LIMITATION—Mortgage of reversion—Arrears of interest - 726
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—— Mortgagee taking possession of real estate —Redemption action—Right to redeem policy separately - - - 175
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RECEIVER — Appointment — Jurisdiction — Married woman - - - 16
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—— Charge on land—Legal remainder—"Actual delivery in execution" - - 465
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—— Report of official receiver—Sufficiency—Finding of fraud — Order for public examination - - - 215
See COMPANY. 16.

RECTIFICATION—Register—Filing of memorandum in lieu of contract—Application for relief—Practice - - 184
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REDEMPTION—Clog on equity of—Notice to pay off principal - - - 747
See MORTGAGE. 1.

—— Lapse of time, mortgagor barred by—Real estate — Right to redeem life policy separately - - - - 175
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REGISTER—Rectification—Filing of memorandum in lieu of contract—Application for relief—Practice - - - 184
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REGISTRATION—Costs—Taxation—Purchase of lands in Middlesex—"Completion of conveyance" - - - 121
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—— Unregistered trade-mark — Misrepresentation from use of the words "trade mark"
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REMARRIAGE—Gift to son and his wife and children in succession—Remarriage of son after date of will - - 336
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—— Guardianship—Protestant parents—Mother surviving — Sole guardian — Roman Catholic husband - - - 526
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REMUNERATION—Apportionment—Director—Qualification shares - - 775
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RENT—Royalty—Lease—Reversioner—Privity of estate - - - - 656
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RENTS AND PROFITS—Trust to pay or permit tenant for life to receive—Power of sale - - - - - 554
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REPAIRS—Equitable tenant for life—Liability—Covenants—Insurance - - 821
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REPUDIATION — After action brought — Prospectus—Untrue statements — Reasonable public notice - - - 393
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RESERVATION — Mines — Working power — Manorial rights - - - 567
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RESETTLEMENT—Compound settlement—Title
See SETTLED LAND. 1. 275

RESIDUE — Special power of appointment — Bequest of residue to object of power—Intention to exercise - - 563
See POWER. 3.

RESTRAINT OF MARRIAGE—Condition—Marriage with consent—Alternative bequest
See WILL. 3. 63

RESTRAINT OF TRADE—*Covenant in—Validity—Reasonable Protection of Covenantee—Public Policy.*

The plaintiffs, hay and straw merchants, at Brentford, who carried on an extensive wholesale and retail trade, in the United Kingdom, France, Belgium, and Canada, and had permanent places of business in the United Kingdom and France in October, 1897, agreed to employ the defendant as their clerk and foreman, in Calais or elsewhere, at a weekly wage of 35*s*. The defendant entered into a covenant that he would not, for the space of twelve months next after his leaving or being dismissed, carry on the business of a hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of a hay and straw merchant, in the United Kingdom, or in France, or in the kingdom of Belgium, or in Holland, or in the Dominion of Canada. The defendant continued in the plaintiffs' employment until November, 1898, when he voluntarily left them, and entered into the employment of a rival hay and straw merchant in London:—

Held (by Lindley M.R. and Rigby L.J., Vaughan Williams L.J. dissenting), that the restraint imposed on the defendant was not unreasonable, at any rate so far as the United Kingdom was concerned; that the covenant was not void on any ground of public policy; and that the defendant must be restrained from violating his covenant:

Held, by Vaughan Williams L.J., that the covenant was unreasonable and invalid, and ought not to be enforced by injunction.

Decision of Kekewich J. affirmed.

Per Lindley M.R. and Rigby L.J.: A covenant in restraint of trade, which is not wider than is reasonably required for the protection of the covenantee, will not be held void on any ground of public policy, unless some specific ground for so holding it void can be clearly established. But such cases are exceptional.

Per Vaughan Williams L.J.: The old rule of law that all covenants in restraint of trade are primâ facie contrary to public policy, and therefore void, has not been rescinded by recent decisions. E. UNDERWOOD & SON, LIMITED *v.* BARKER - - - - - - **C. A. 300**

RESTRICTIVE COVENANT—Noise—Nuisance—Boys' school—Misrepresentation by vendor's agent—Rescission - 92
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RETAINER—Right of—Administration to creditor—Form of administration bond 602
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—— Statute-barred debt - - - 726
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REVERSION — Sale of — Equitable interest — Delay - - - - 5
See SPECIFIC PERFORMANCE.

REVERSIONARY INTEREST IN PERSONALTY —Construction of will—"Any money . . . . that may be in my possession" *See* WILL. 4. 688

REVERTER — Fee simple conditional — Wills Acts—Devise - - - 544
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REVOCATION—Amendment of specification — Pending action or proceeding for revocation—Disclaimer - - - 157
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RIPARIAN OWNER—Consent—Stream—Interruption—Local authority—"Injuriously affecting" - - - - 583
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—— **Order XXV., r. 5** (Proceedings in lieu of Demurrer) - - - - 494
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—— **Order XLII., r. 31** (Execution) - 671
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—— **Order LV., r. 9 (b)** (Chambers in the Chancery Division) - - - 465
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SALE—Bonâ fide sale to solicitor—Action to set aside—Laches - - - 873
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—— By order of the Court—Purchaser for value without notice - - - 611
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—— Legal remainder—Charge on land—Receiver —"Actual delivery in execution" 465
See JUDGMENT DEBT.

—— Power of—Trust to pay or permit tenant for life to receive rents and profits - 554
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—— Tenant for life—Undivided share in land—Power to sell - - - 639
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SATISFACTION—Creditor—Proof — Fully paid shares taken in payment of debt—Failure of consideration - - 108
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SCHOOL—Noise—Nuisance — Misrepresentation by vendor's agent—Rescission - 92
See VENDOR AND PURCHASER. 2.

SECURED CREDITORS—Unauthorized borrowing—Money applied in payment of debts of company—Subrogation - 440
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SECURITIES—Lumping debts and—Proof—Bills of exchange - - - - 485
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SERVICE — Corporation — Order against—Disobedience—Enforcement by attachment of director - - - - 671
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SETTING ASIDE—Bonâ fide sale to solicitor—Laches - - - - 873
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SETTLED LAND—*Compound Settlement—Settlement—Creation of Jointure and Portions Charges —Resettlement—Limitation of new Life Estate without in Terms restoring former Life Estate—Title—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 20, *sub-ss.* 1, 2; *s.* 50; *s.* 58, *sub-s.* 1 (*iv.*)

By a deed dated in 1861, lands were settled to the use of A. for life with remainder to his first and other sons successively in tail male. In exercise of a power reserved to him by this deed, A., upon his marriage in 1865, by deed charged the lands with a jointure rent-charge for his wife, and with portions for his younger children, both charges being secured by terms of years in the usual way. In 1889, in order to carry out a family arrangement, A. and B. (his eldest son) by deed No. 1 disentailed the lands, and by deed No. 2, in exercise of a power contained in deed No. 1, appointed them to the use of A. for life, with remainders over, without, however, in terms expressing that this life estate was limited to A. in restoration or continuation of his former life estate:—

Held, that deed No. 2 of 1889 should not under the circumstances be treated as the only settlement of the property, but should be treated as constituting, together with the previous deeds of 1861, 1865, and 1889, a "settlement" within the meaning of the Settled Land Act, 1882, ss. 2 and 20; and *held* accordingly that it was competent for A. to sell and make a good title to the lands discharged from the jointure and portions, upon trustees of the settlement being appointed to receive the purchase-money.

The words in sub-s. 1 of s. 2 of the Act of 1882, "stands for the time being limited to or in trust for any persons by way of succession," have no technical force, and, according to their natural meaning, include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life and the terms of years limited to trustees to secure them.

There may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one only of the deeds. The decision of Stirling J. on this point in *In re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, approved.

The effect of s. 50 of the Act of 1882 is that the statutory power of sale given to a tenant for life by the Act of 1882 is not annexed to his estate as in ordinary conveyancing, but is vested in him once for all by the Act, is incapable of being assigned or released, and continues exercisable by him notwithstanding assignment by him of his estate; so that, although the life estate of A. must be treated as a new life estate arising under the resettlement, the statutory power of sale vested in A. before the resettlement was not affected by it.

Per Vaughan Williams L.J.: Where an estate

SETTLED LAND—*continued.*
in fee simple is settled in the ordinary way with the usual limitations and powers, it is doubtful whether the terms to secure jointure or portions, or the interests thereby secured, are limitations by way of succession within the meaning of s. 2 of the Settled Land Act of 1882, for such terms are mere charges overriding the successive limitations which exhaust the fee and come into operation contemporaneously with them.

The decision of Kekewich J. reversed.

The decision of Stirling J. in *In re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345, approved. *In re* MUNDY AND ROPER'S CONTRACT **C. A. 275**

2. —— *Fetter on Power of Sale—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 51.

A testator settled real estate. His widow died in 1869, having bequeathed personal estate to be held on trust for the person entitled to the enjoyment of the settled real estate, with a proviso that in case of sale of the real estate, either during the life of a person then in being, or within twenty-one years from her death, her trust property should go over:—

Held, that in case of sale of the real estate under the Settled Land Acts the gift over was ineffectual. *In re* SMITH. GROSE-SMITH *v.* BRIDGER - - - - **North J. 331**

3. —— *Tenant for Life—Trust to allow A. to Occupy a Mansion-house and Land so long as she might wish to do so—Trustees for Purposes of Settled Land Act—Trustees of Term with Power to Raise Money by Mortgage or otherwise—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 3, 5, 8, 10 (*i.*); *s.* 38, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*vi.*)

By a settlement a mansion-house and lands were (subject to a rent-charge) vested in trustees for a term of 1000 years, upon trust in the first place to allow the plaintiff to occupy the mansion-house and certain specified lands, rent free, for so long as she might wish to continue to do so. And upon further trust, by mortgage thereof, or by or out of the rents and profits thereof, or by any other reasonable ways or means, to raise some specified sums of money, and, subject to the term, to the use of one of the defendants in fee:—

Held, on the authority of *In re Eastman's Settled Estates*, W. N. (1898) 170 (15), that the plaintiff was tenant for life, within the meaning of the Settled Land Act, 1882, of the mansion-house and lands which she was to be allowed to occupy, and could in respect of them exercise the powers conferred by the Act upon a tenant for life:

Held, also, that the trustees of the term were not trustees for the purposes of the Act, but that trustees for those purposes must be appointed. *In re* CARNE'S SETTLED ESTATES - **North J. 324**

4. —— *Tenant for Life—Undivided Share in Land—Power to Sell—Vendor and Purchaser—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 6–10; *s.* 19.

Where under a will land is devised in moieties and each moiety is separately settled by the will itself the tenant for life of one undivided moiety can sell his moiety under the powers of the Settled Land Act, 1882, without the concurrence of the person or persons entitled to or having the power or right of disposition over the other undivided moiety.

In re Collinge's Settled Estates, (1887) 36 Ch. D. 516, overruled.

Appeal from Romer J. dismissed. COOPER *v* BELSEY - - - - - **C. A. 639**

SETTLEMENT—*Validity—Illegal Consideration—Marriage with Sister of Deceased Wife.*

On April 30, 1873, a widower executed a deed, by which, in contemplation of a marriage which "had been agreed upon and was intended shortly to be solemnized" between himself and Clara Probyn, he conveyed real estate to trustees in fee, to the use of himself and his assigns during his life, with remainder to the use of Clara Probyn during her life, "provided she shall remain a widow and unmarried; and from and immediately after her decease or marriage, whichever event shall first happen," to such uses as the settlor should by deed or will appoint, and, in default of appointment, to the use of such person or persons as would be entitled thereto if the deed had not been executed. Clara Probyn was in fact a sister of the settlor's deceased wife, though this was not stated in the deed. On March 5, 1877, he went through the ceremony of marriage with her, and she afterwards lived with him as his wife. He died in November, 1891, intestate. He had not exercised the power of appointment by deed reserved to him by the settlement. During the life of his son and heir-at-law Clara Probyn received the rents of the property without objection on his part.

Upon a summons taken out after the son's death by the trustees of the settlement against Clara Probyn and the son's heir-at-law and administratrix to determine who was entitled to the property:—

Held, that the trust for Clara Probyn was illegal and invalid, and that the property was held on trust for the son's administratrix, she being, under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), his real representative.

Ayerst v. *Jenkins*, (1873) L. R. 16 Eq. 275, distinguished. PHILLIPS *v.* PROBYN **North J. 811**

—— Settled land.
See Cases under SETTLED LAND.

—— Voluntary settlement by mortgagor after mortgage—Notice—Priority - **132**
See MORTGAGE. 4.

SHAREHOLDER.
See Cases under COMPANY.

SHARES.
See Cases under COMPANY.

SHORTHAND NOTES—Costs—Particulars of objections—Practice - - - **803**
See PATENT. 3.

SOLICITOR—*Common Order for Delivery and Taxation of Bill of Costs—No Costs claimed by Solicitor—Liability to render Cash Account—Solicitor and Client.*

Under the common order for the delivery and taxation of a solicitor's bill of costs, if the solicitor makes no claim for costs, and swears that he has not retained any costs out of moneys of his

SOLICITOR—*continued.*
client in his hands, he is not liable to deliver a cash account to his client.

Semble, that under such circumstances the solicitor would still be liable to account to the client upon a proper application under the summary jurisdiction over solicitors. *In re* LANDOR (A SOLICITOR) - - - **North J. 818**

2. —— *Costs—Middlesex—Purchase of Lands in—Taxation—Scale Fees—Registration—"Completion of Conveyance"—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44); *General Order thereunder, rr.* 2, 4, *Sched. I., Part I.*

On a purchase of lands, the scale fee allowed to the purchaser's solicitor by Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, for "preparing and completing conveyance," covers and includes his costs (other than money out of pocket) in respect of the registration of a memorial of the conveyance in cases where the land purchased is situated within a register county.

The decision of Kekewich J. affirmed. GREY *v.* CURTICE - - - - **C. A. 121**

—— Bonâ fide sale to solicitor—Action to set aside—Laches - - - **873**
See MORTGAGE. 3.

—— Costs—House of Lords—Liability of pauper appellant - - - - **853**
See PRACTICE. 3.

—— Costs—Solicitor and client—Corporation—Negligence—Appeal - - **1**
See PRACTICE. 2.

—— Profit costs—Gift to attesting witness—Codicil—Republication - - **764**
See WILL. 1.

SPECIAL POWER—Appointment - - **563**
See POWER. 3.

SPECIALTY DEBT—Simple contract debt—Preference - - - - **541**
See ADMINISTRATION. 2.

SPECIFIC PERFORMANCE—*Delay—Sale of Reversion—Equitable Interest — Vendor and Purchaser.*

S., in April, 1886, contracted to sell to K. the equitable reversion in a sum of Consols vested in trustees, the purchase to be completed on June 25, when an assignment was to be executed containing a covenant by the purchaser to pay succession duty and indemnify the vendor and his estate against it. The purchaser was to pay a deposit; and if the purchase was not completed on June 25, he was to pay interest on the balance of his purchase-money. The deposit was paid and the title investigated; when it appeared that the reversion was subject, along with other property, to heavy incumbrances which the vendor could not discharge, and from which the incumbrancers declined to release the reversion. In January, 1888, S. became bankrupt, and his property was sold, under which sale R. claimed title to the reversion. K.'s interest under the contract for sale became vested in B. In 1890 S. died. In 1895 the reversion fell into possession. No active step to enforce the contract for sale was taken till March 5, 1896, when B. obtained leave to attend proceedings in an action in which the

SPECIFIC PERFORMANCE—*continued.*
estate of S. was being administered. He then took out a summons claiming the Consols, upon which summons an order of May 11, 1896, was made directing an inquiry who was entitled to them, with a provision that the applicant's claim was to be treated as if he had commenced an action for specific performance on March 5, 1896. The master found that R. was entitled, and Stirling J. affirmed his decision:—

Held, that, although the interest to which the contract related was purely equitable, so that the complete property in it could pass without a formal conveyance, B. could only obtain relief on the ground of specific performance; that the proviso in the order of May 11, 1896, was therefore right; that he was barred from relief by delay; and that the appeal ought to be dismissed. LEVY *v.* STOGDON - - - - **C. A. 5**

—— Commonable rights—Agreement for sale—Evidence—Admissibility—Reputation
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TENANT FOR LIFE—*Repairs—Liability—Covenants—Insurance—Equitable Tenant for Life.*

An equitable tenant for life of leaseholds under a will is bound, during the continuance of his interest, as between himself and his testator's estate, to perform the tenant's continuing obligations under the lease; but he is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant which had arisen before the testator's death.

In re Courtier, (1886) 34 Ch. D. 136, considered.

In re Tomlinson, [1898] 1 Ch. 232, differed from. *In re* BETTY. BETTY *v.* ATTORNEY-GENERAL - - - - North J. 821

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TENANT FOR LIFE AND REMAINDERMAN—*Mortgage of Reversion—Arrears of Interest—Foreclosure and Redemption—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2—*Waste by Tenant for Life—Dilapidation of Buildings—Depreciation of Marsh Lands—Damages—Statute-barred Debt—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16)—*Retainer.*

A testator, who died in 1878, devised some cottages and marsh lands upon trust for his wife for life, she out of the rents and profits keeping "the premises in good tenantable repair and condition," and after her death upon trust for C. in fee. In 1882 C. mortgaged his reversion in fee to the widow, who was in receipt of the rents and profits of the property as tenant for life. She died in 1897, and her executors brought an action of foreclosure against C., who had made no payment either of principal or interest since the date of the mortgage, and who set up the Statutes of Limitations. At the trial C. submitted to the usual judgment for foreclosure with arrears of interest limited to six years prior to the date of the writ, but counter-claimed damages against the estate of the tenant for life for non-repair of the cottages and depreciation of the marsh lands, alleging that the latter had been continuously mown against all custom, and had thereby been greatly impoverished, and offered to redeem on the footing that any damages awarded him should be set off in account against what was due on the mortgage, and contended that on redeeming he was only bound to pay six years' arrears of interest prior to the date of the writ. The testator had in 1874 granted a seven years' lease of the marsh lands, with a covenant by the lessee not to mow them oftener than once in any one year, but to keep them during the term in good condition, and the tenant for life in granting subsequent leases of the same lands had inserted covenants as to mowing similar to that in the testator's lease. The cottages were out of repair and the marsh lands had been depreciated to some extent by mowing:—

Held, that C. was entitled to damages for non-repair of the cottages, but not for depreciation of the marsh lands, the tenant for life in her

TENANT FOR LIFE AND REMAINDERMAN—*continued.*

dealings with the latter having followed the course that had been adopted by the testator:

Held, also, that C. on redeeming was not limited to six years' arrears of interest prior to the date of the writ, but must pay all arrears of interest with principal and costs from the date of the mortgage.

Du Vigier v. *Lee*, (1843) 2 Hare, 326, and *Mason* v. *Broadbent*, (1863) 33 Beav. 296, discussed; and *Edmunds* v. *Waugh* (1866) L. R. 1 Eq. 418, and *In re Marshfield*, (1887) 34 Ch. D. 721, followed on this point.

The tenant for life had lent C. sums of money by way of loan without security, which loans were statute-barred at the date of her death:—

Held, that her executors were not entitled to retain the damages assessed for non-repair of the cottages in discharge of the statute-barred loans.

Courtenay v. *Williams*, (1844) 3 Hare, 539, discussed on this point. DINGLE *v.* COPPEN. COPPEN *v.* DINGLE - - - **Byrne J. 726**

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TRADE-MARK — *Unregistered Trade-mark — Common Law Right—Passing off—Imitation of Get-up—Misrepresentation from Use of the Words "Trade Mark" — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 105.

The use by a trader on his goods of the words "trade mark" in connection with a particular mark which he has used as a trade-mark, but for which he has not obtained registration, does not necessarily imply that the trade-mark is registered so as to constitute an offence under s. 105 of the Patents, Designs, and Trade Marks Act, 1883, and apart from s. 105 is not of itself such a misrepresentation as to disentitle him to relief in an action to restrain the imitation of the get-up of his goods. SEN SEN COMPANY *v.* BRITTEN - - - **Stirling J. 692**

TRADE UNION — *Picketing* — "*Watching and besetting*"—"*Wrongfully and without legal authority*" — *Injunction* — *Criminal Law Amendment Act*, 1871 (34 & 35 *Vict. c.* 32), *s.* 1—*Conspiracy, and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7.

Per Lindley M.R. and Chitty L.J.: To watch or beset a man's house, with the view to compel him to do or not to do that which it is lawful for him not to do or to do, is, unless some reasonable justification for it is consistent with the evidence, a wrongful act: (1.) because it is an offence within s. 7 of the Conspiracy, and Protection of

TRADE UNION—*continued.*

Property Act, 1875; and (2.) because it is a nuisance at common law for which an action on the case would lie; for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset: *Bamford* v. *Turnley*, (1860) 3 B. & S. 62; *Broder* v. *Saillard*, (1876) 2 Ch. D. 692, 701; *Walter* v. *Selfe*, (1851) 4 De G. & Sm. 315; *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409.

Proof that the nuisance was caused by an attempt "peaceably to persuade other people" would afford no defence to such an action; though persons may be peaceably persuaded provided the method employed is not a nuisance.

In the expression at the beginning of s. 7 "with a view to compel," the word "view" does not import motive—it imports purpose.

Per Vaughan Williams L.J.: The words "wrongfully and without legal authority" in s. 7 of the Act of 1875 mean unwarranted by law.

According to the true meaning of s. 7 all watching and besetting is unlawful except such as is merely for the purpose of obtaining or communicating information; but the fact that a communication invites workmen to discontinue working as soon as they lawfully may does not take such communication out of the proviso in s. 7.

By the Court: Watching and besetting a person's house with a view to compel some one else is within s. 7, sub-s. 4, for the expression "such other" in the sub-section means "any other."

Sect. 7 of the Conspiracy, and Protection of Property Act, 1875, discussed and explained.

The decision of the Court of Appeal in *J. Lyons & Sons* v. *Wilkins*, [1896] 1 Ch. 811, approved, and held to be in no way overruled by *Allen* v. *Flood*, [1898] A. C. 1, or by any principle laid down therein.

Appeal from decision of Byrne J., holding the plaintiffs entitled to a perpetual injunction to restrain the defendants from watching or besetting either the plaintiffs' works or the works of a sub-manufacturer for them for any purpose except merely to obtain or communicate information, dismissed. J. LYONS & SONS *v.* WILKINS **C. A. 255**

TRUSTEE — *Breach of Trust — Accumulation Clause—Wilful Default—Compound Interest — Rate of Interest—Trustee and Cestui que Trust.*

A testator bequeathed the proceeds of his residuary estate upon trust for his children, and directed the trustees to apply towards the maintenance of the infant children the whole or part of the income of their expectant shares, and to accumulate the residue of the income and the income thereof at compound interest. In an administration action brought by the beneficiaries against the trustees two special inquiries were directed by the judgment—(1.) whether the residuary estate and the accumulated income were properly invested; (2.) what sums had been expended in maintenance; and, as the result of those inquiries, certain balances were found due from the trustees:—

Held, (1.) that in a proper case it was competent for the Court, upon the further considera-

TRUSTEE —*continued.*

tion of an action, to charge trustees with interest, whether simple or compound, on balances retained in their hands, although no case of wilful default had been raised by the pleadings, and the question of interest was not referred to in the judgment; (2.) that as the trustees had neglected to comply with the express trust for accumulation they were chargeable with compound interest upon the balances in their hands, but at the rate of 3 per cent. only, and that in ascertaining such balances trust funds improperly invested were to be treated as remaining in their hands.

Knott v. *Cottee*, (1852) 16 Beav. 77, followed, except as to the rate of interest. *In re* BARCLAY. BARCLAY *v.* ANDREW - - **Stirling J. 674**

2. —— *Breach of Trust—Relief of Trustees from Personal Liability—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

Trustees of a settlement, erroneously assuming that they had a power of sale, sold the leaseholds comprised in the settlement, and thereby diminished the income of the plaintiff, who, as tenant for life of a moiety, was entitled to the rents and profits in specie, though the sale would have been a proper one had the trustees in fact possessed a power of sale.

An action having been brought by the plaintiff against the trustees to make them liable for the diminution of income:—

Held, by the Court of Appeal, affirming the judgment of Kekewich J., [1898] 2 Ch. 521, that as, on the evidence, the trustees had acted honestly and reasonably, they were entitled under s. 3 of the Judicial Trustees Act, 1896, to be relieved from personal liability in respect of the breach of trust, and the action was accordingly dismissed with costs. PERRINS *v.* BELLAMY **C. A. 797**

3. —— *Investments — Investment Clause — Personal Security—Power of Investment—Power to Vary—Consent of Tenant for Life—Loan to Tenant for Life.*

Trustees having a power with the consent of the tenant for life to lend the trust funds on personal security may, if satisfied that there is a reasonable prospect of repayment, lend them on personal security to the tenant for life.

The proposition to the contrary in Lewin on Trusts, 10th ed. p. 335, purporting to be founded on *Keays* v. *Lane*, (1869) Ir. R. 3 Eq. 1, is not borne out by that authority. *In re* LAING'S SETTLEMENT. LAING *v.* RADCLIFFE - **Kekewich J. 593**

—— Appointment—"Ecclesiastical charity"—Parish council—Churchwarden trustees
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—— Appointment of—Title of petition—Policy by husband for benefit of wife - **38**
See HUSBAND AND WIFE.

—— Breach of trust—Maintenance—Education—Bringing up—Immoral home—Control of Court - - - - **719**
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—— Priority—Reversionary trust fund—Notice to existing trustees—Death or retirement of trustees - - - **163**
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—— Trustees for purpose of Settled Land Act
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UNDIVIDED SHARE—Land—Tenant for life—Power to sell - - - **639**
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UNLIQUIDATED DAMAGES—Misrepresentation—Wrongful act done by deceased person—"Actio personalis moritur cum personâ" - - - - **387**
See ADMINISTRATION. 1.

VALIDITY—Settlement—Illegal consideration—Marriage with sister of deceased wife
See SETTLEMENT. **811**

VENDOR AND PURCHASER — *Purchaser for Value without Notice—Sale by Order of the Court—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70, *sub-s.* 1.

If an order of the Court dealing with property, having regard to its terms and the proceedings in which and the circumstances under which it was made, would not be held, apart from s. 70, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, to be intended to bind any particular estate or interest in the property, then that estate or interest will not be bound by the order by reason or virtue of that sub-section.

In re Hall Dare's Contract, (1882) 21 Ch. D. 41, and *Mostyn* v. *Mostyn*, [1893] 3 Ch. 376, discussed and distinguished. JONES *v.* BARNETT **Romer J. 611**

2. —— *Restrictive Covenant—Noise—Nuisance—Boys' School — Misrepresentation by Vendor's Agent—Rescission.*

A deed of covenant of 1851, relating to a building estate, after forbidding certain offensive and noisy trades and businesses, provided that there should not be carried on "any trade or business or occupation whatsoever whereby any injurious offensive or disagreeable noise or nuisance shall or may be occasioned caused or made." The plaintiff entered into a contract for the purchase from the defendant of a house on this estate for the purpose of a boys' school, on the representation of the defendant's agent that there was nothing in this deed which would prevent him from carrying on such a school on this property. On an action for rescission of the contract:—

Held, that the carrying on of the plaintiff's school in an ordinary and reasonable way would be within the wording of the restrictive covenant, which could not be limited to trades or businesses ejusdem generis with those specifically mentioned; and that the plaintiff, having been induced by a misrepresentation of fact made by the defendant's agent to enter into this contract, was entitled in equity to rescission, even though the representation had not been made fraudulently. WAUTON *v.* COPPARD - **Romer J. 92**

VENDOR AND PURCHASER—*continued.*

3. —— *Specific Performance—Property used as a Disorderly House.*

Property sold by auction as an eligible freehold, and which consisted of a tenement used as a house and shop, was discovered before completion to be used by the vendors' quarterly tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, and a proviso for re-entry in case of breach of covenant:—

Held, in accordance with the observations of Wigram V.-C. in *Lucas* v. *James*, (1849) 7 Hare, 410, 418, that the improper use of the property was not a sufficient ground for refusing specific performance at the suit of the vendors. HOPE *v.* WALTER - - - **Cozens-Hardy J. 879**

—— Delay — Sale of reversion — Equitable interest - - - - - **5**
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—— Glebe lands—Contract for sale by vicar—Non-payment of principal — Vendor's lien - - - - - **99**
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—— Tenant for life—Undivided share in land—Power to sell - - - **639**
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VESTING—Legal estate—Charge of real estate with debts and legacies—Tenant for life—Power of sale - - - **554**
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—— Streets—Subsoil—Extent of ownership **474**
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VESTING ORDER—Lunatic trustee — Appointment of new trustees—Jurisdiction **79**
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VOLUNTARY ASSIGNMENT — Policy—Protection of creditors—Following assets **831**
See FRAUDULENT CONVEYANCE.

VOLUNTARY GIFT — *Equitable Assignment — Banker's Deposit Receipt — Indorsement and Delivery—Donee appointed Executor.*

The indorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operate as a good equitable assignment of the amount on deposit at the bank; but, if anything be required to complete the gift, the appointment of the donee as executor of the donor perfects the gift. *In re* GRIFFIN. GRIFFIN *v.* GRIFFIN **Byrne J. 408**

VOLUNTARY SETTLEMENT — By mortgagor after mortgage—Notice—Priority **132**
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WASTE—By Tenant for life—Dilapidation of buildings—Depreciation of marsh lands—Damages - - - - **726**
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WATCHING—Besetting—Picketing—Injunction
See TRADE UNION. **255**

WATER-CLOSET—Substitution of water-closet for privy—Local authority—Powers **844**
See LOCAL GOVERNMENT. 1.

WATERCOURSE—*Riparian Owner — Stream—Interruption—Alteration—Local Authority—"Injuriously affecting"—Consent of Riparian Owner—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 332.

Where a riparian owner has a common law right to the uninterrupted flow of a stream past his tenement, the local authority, in interrupting or altering the flow for the purpose of providing a water supply for their district under the Public Health Act, 1875, are "injuriously affecting" the stream within s. 332, which they are not entitled to do unless they have first obtained the written consent of the riparian owner under that section, the local authority having no compulsory powers under that Act to interfere with or alter the flow of the stream, and the common law right of the riparian owner being unaffected by the Act. He is therefore entitled to bring an action to maintain his right, even though the Act of the local authority may cause him no sensible damage.

Swindon Waterworks Co. v. *Wilts and Berks Canal Navigation Co.*, (1875) L. R. 7 H. L. 697, considered. ROBERTS *v.* GWYRFAI DISTRICT COUNCIL - - - **Kekewich J. 583**

WAY-LEAVE—*Landowner — Railway Company—Agreement for Lease—Executory Instrument—Construction — Ancient Document — Contemporaneous Usage or Interpretation—Mistake—Way-leave—Incorporeal Hereditament—Royalty—Rent—"Assigns"— Lease— Reversioner — Privity of Estate—32 Hen.* 8, *c.* 34, *s.* 1.

By an agreement under seal dated in 1854, and made between H., the owner in fee of land, and a railway company, while a bill—which subsequently became an Act—was before Parliament to enable the company to construct certain railways intended to pass to a great extent over H.'s land, it was agreed that H. should, immediately after the passing of the bill, grant to the company, by lease in the form set out verbatim in the agreement, a "way-leave" over his land, with the right to make and use the railways thereon. The form of lease so embodied in the agreement purported to grant to the company a way-leave and right to make and use the railways, or such parts thereof as were to pass over H.'s land, for the term of 1000 years, the company paying to H., "his heirs or assigns," a specified rent on coal carried over "any part of the railways comprehended in the" special Act to Port B. The form of lease gave H., "his heirs or assigns," powers of distress and entry for non-payment of rent, and contained a covenant by the company with H., "his heirs and assigns," to pay the rent to him, "his heirs or assigns." No formal lease was ever executed, but the company entered on H.'s land and constructed the railways. One of them, the "M. branch," partly crossed H.'s land, and coal was carried over it to Port B. For upwards of forty years from the date of the agreement rent was paid by the company for coal carried over this branch so far only as it crossed H.'s land, the parties acting throughout on the

WAY-LEAVE—*continued.*

assumption that under the agreement no rent was payable for coal not carried over H.'s land.

In an action brought by H.'s successor in title to the land against the company claiming that, according to the true construction of the agreement, rent was payable for coal passing over any part of the M. branch to Port B., whether it crossed his land or not:—

Held, (1.) that the agreement with the embodied form of lease was not an executory instrument, but must be construed as an agreement, complete in all its terms, for a lease of a way-leave for 1000 years over H.'s land; (2.) that the agreement could not be regarded as an ancient document capable of being construed by the light of contemporaneous usage, but must be construed according to its literal meaning, namely, that rent was payable for coal carried over any part of the M. branch to Port B., whether it crossed H.'s land or not; (3.) that the way-leave granted was an incorporeal hereditament annexed to the land in the hands of H. or his successors in title: and (4.) that the rent, whether for coal carried over H.'s land or not, must be regarded as payable in respect of the land leased, and was consequently payable to the plaintiff as the owner of the reversion within 32 Hen. 8, c. 34, s. 1, and not to H.'s legal personal representative, there being sufficient privity of estate between the owners of the land over which the way-leave was granted and the company to enable such owners to sue the company on its covenant.

Decision of Byrne J., [1898] 2 Ch. 674, affirmed. LORD HASTINGS *v.* NORTH EASTERN RAILWAY COMPANY - - - **C. A. 656**

WIFE—Policy by husband for benefit of—Appointment of trustee—Title of petition *See* HUSBAND AND WIFE. **38**

WILFUL DEFAULT—Breach of trust—Accumulation clause—Compound interest—Rate of interest - - - - **674**
See TRUSTEE. 1.

WILL—*Attesting Witness—Gift to—Solicitor—Profit Costs—Codicil—Republication—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 15.

Though a gift by will to an attesting witness is utterly null and void, it may be rendered effectual, if the will is republished by a codicil referring to the will but not attested by the legatee, and (applying the principles of *Gurney* v. *Gurney*, (1855) 3 Drew. 208, and *Re Marcus*, (1887), 57 L. T. 399) this benefit will not be lost to the legatee by his subsequent attestation of a second codicil. *In re* TROTTER. TROTTER *v.* TROTTER - - - - **Byrne J. 764**

2. —— *Charge of Real Estate with Debts and Legacies—Devisees in Trust—Vesting of Legal Estate—Trust to pay or permit Tenant for Life to Receive Rents and Profits—Implied Power of Sale—Law of Property Amendment Act*, 1859 (*Lord St. Leonards' Act*, 22 & 23 *Vict. c.* 35), *s.* 14.

A testator by his will dated in 1868 appointed his wife executrix thereof, and directed payment of his debts without saying by whom, and, after bequeathing certain pecuniary legacies, he gave the residue of his real and personal estate to two

WILL—*continued.*

other persons upon trust as to his real estate to pay to or permit and suffer his wife to receive the rents and profits for her life, and after her death upon trust to pay to or permit and suffer his niece to receive the rents and profits for her life for her separate use; and after declaring certain trusts with regard to his personal estate, he directed his trustees after the death of the survivor of his wife and niece to pay two pecuniary legacies, and after payment thereof to stand possessed of his real estate and the residue of his personal estate upon certain other trusts. The trustees asked for a declaration that they had power under s. 14 of Lord St. Leonards' Act to sell the real estate:—

Held, (1.) upon the principle of *Greville* v. *Browne*, (1859) 7 H. L. C. 689, that there was a charge upon the real estate of the debts and immediate legacies, and also of the two future legacies; (2.) that the charge of the debts and immediate legacies being unaccompanied by any express direction to the trustees to pay, did not vest the legal estate in them; (3.) that the form of the gift to the widow, in the absence of any trust for her separate use, vested the legal estate in her for her life, the purposes of the will not requiring that the legal estate should vest in the trustees during her lifetime; (4.) that, the testator not having devised the real estate to the trustees for his whole interest therein, the trustees had no power to sell under s. 14 of Lord St. Leonards' Act.

Doe v. *Biggs*, (1809) 2 Taunt. 109, and *Doe* v. *Bolton*, (1839) 11 Ad. & E. 188, followed.

Harton v. *Harton*, (1798) 7 T. R. 652, and *Van Grutten* v. *Foxwell*, [1897] A. C. 658, distinguished. *In re* ADAMS AND PERRY'S CONTRACT **Stirling J. 554**

3. —— *Condition—Restraint of Marriage—Marriage with Consent—Alternative Bequests.*

A testator by his will bequeathed to his son out of personal estate an annuity of 2000*l.*, and, in the event of his marriage, an additional annuity of 1000*l.*; and by a codicil he directed that the additional annuity should be payable only if the son should have married with the previous consent in writing of the trustees of the will:—

Held, that, as the testator had provided for the son in any event, the condition as to the consent was not in terrorem and was valid.

The principle of *Gillet* v. *Wray*, (1715) 1 P. Wms. 284, applied.

Reynish v. *Martin*, (1746) 3 Atk. 330, distinguished. *In re* NOURSE. HAMPTON *v.* NOURSE **Stirling J. 63**

4. —— *Construction—"Any Money . . . . that may be in my Possession"—Reversionary Interest in Personalty.*

Testatrix, who died in 1892, by her will, dated in 1891, after making certain bequests of sums of stock, declared as follows: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death after the payment of my debts funeral and testamentary expenses I give absolutely" to P. She then made certain specific gifts of chattels. At her death she was

entitled to a reversionary interest in personalty which fell into possession in 1897 :—

Held, that the reversionary interest passed under the bequest to P. *In re* EGAN. MILLS *v.* PENTON - - - - **Stirling J. 688**

5. —— *Gift to a Son and his Wife and Children in Succession—Remarriage of Son after date of Will—Construction of Will.*

A testator devised and bequeathed a share of his residuary estate upon trust to pay the income thereof to his son B. for life, and after his decease to B.'s wife for life, and after her decease upon trust as to both income and corpus for B.'s children living at B.'s decease; and the will provided for the cesser of B.'s interest upon alienation or bankruptcy, in which event the trustees were to apply the income of the share thereinbefore directed to be invested for B. "and his family" towards the maintenance of B., "his wife and children." B. had a wife living at the date of the will; but she afterwards died, and he married a second wife, who survived him :—

Held, that there was sufficient context in the will to rebut the presumption that the gift to B.'s wife for life was confined to the wife living at the date of the will, and that the widow was entitled. *In re* DREW. DREW *v.* DREW - **Stirling J. 336**

6. —— *"Issue"—Gifts to—Words—Several Gifts restricted to "Children"—Unqualified Gift—Canon of Construction.*

Twelve distinct legacies contained gifts over to the issue of legatees dying in the testator's lifetime. Except in the case of the 11th legacy, the gift over contained qualifying words clearly restricting the class of issue to children. In the 11th case the gift over was unqualified :—

Held, that notwithstanding the canons of construction laid down in *Ridgeway* v. *Munkittrick*, (1841) 1 D. & War. 84, 93, and *Rhodes* v. *Rhodes*, (1859) 27 Beav. 413, 417, to the effect that the same word is primâ facie to be construed in the same way throughout a will, the Court was not bound to restrict the class of issue to children in the 11th case.

In re Warren's Trusts, (1884) 26 Ch. D. 208, 216, followed. *In re* BIRKS. KENYON *v.* BIRKS **Kekewich J. 703**

7. —— *Marshalling—Gift of Legacies followed by Gift of Real and Personal Estate in one Mass—Mortgaged Estate Devised Free from Incumbrances—Pecuniary Legatees and Annuitants—Priorities—Marshalling since Real Estate Charges Act*, 1854 (17 & 18 *Vict. c.* 113).

A testator, who died in 1889, after legacies of 100*l.* to four of his children, made several specific devises, freed and discharged from any mortgages there might be thereon at the time of his death, for the benefit of a son and three daughters, and declared that if he should sell any of the houses thereinbefore given for the benefit of his daughters, his trustees should out of his residuary estate stand possessed of a sum equivalent to the price received for the same upon trusts similar to those declared respecting the house sold: the testator then gave all other his real and personal estate upon trust to pay annuities of 250*l.* to each of his sons, and out of

the balance of the income thereof to pay the specific incumbrances upon the said estate, and after payment off of the said incumbrances, upon trust to assign his said residuary estate to his two sons equally. The testator sold one of the specifically devised houses for 9800*l.* The estate proved insufficient for payment in full to all the beneficiaries :—

Held, (1.) that the four pecuniary legacies were charged upon the entire residue, and had priority over all other payments directed to be made to beneficiaries; (2.) that the annuities were only given to the sons in their capacity of residuary legatees, and were therefore not payable until the sum representing proceeds of sale of realty sold by the testator, and the mortgage debts on the specifically devised realty, had been provided for; (3.) that the 9800*l.*, representing proceeds of sale, was to be treated as an ordinary legacy made payable out of residue; and (4.) that the rule in *Lutkins* v. *Leigh*, (1734) Cas. t. Tal. 53, that the pecuniary legatee has priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mortgage debt paid off out of residue, applied, not having been expressly negatived by the testator, and that the devisees of the mortgaged property were not entitled to compete with the legatees.

Porcher v. *Wilson*, (1866) 14 W. R. 1011, followed.

Smith v. *Smith*, (1860) 10 Ir. Ch. Rep. 89 and 461, not followed. *In re* SMITH. SMITH *v.* SMITH **Romer J. 365**

8. —— *Reverter—Fee Simple Conditional—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 3—*Devise.*

The possibility of reverter on failure of a fee simple conditional is "a right of entry for a condition broken" within the meaning of and devisable by force of s. 3 of the Wills Act, 1837. PEMBERTON *v.* BARNES - - **North J. 544**

9. —— *"Survivor"—Trust Moneys—Gift of Life Interest to A.—After Death of A. Direction to Pay and Divide Equally between two Persons—"And if either of them shall be then dead for the Survivor"—Death of both Legatees before Determination of Life Interest—Meaning of Words "Either" and "Survivor."*

A testatrix gave residuary trust moneys upon trust to pay the interest to her sister Thirza during her life, and after her death to pay and divide the said trust moneys equally between the testatrix's two sisters Frances and Sarah, share and share alike, "and if either of my said sisters shall be then dead . . . . upon trust for the survivor of my said sisters absolutely" :—

Held, by Lindley M.R. and Vaughan Williams L.J. (Rigby L.J. dissentiente), that the period of distribution was not the death of Sarah who died first, or of Frances who was the survivor of the two legatees, but the death of Thirza, to whom the life interest was given; and that both Sarah and Frances being dead at that time there was then no survivor, and the clear original gift to Sarah and Frances as tenants in common was not divested.

The decision of North J. affirmed.

WILL—*continued.*

White v. *Baker*, (1860) 2 D. F. & J. 55, discussed and distinguished. *In re* Pickworth. Snaith *v.* Parkinson - - - **C. A. 642**

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—— "Survivor" - - - - **642**
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—— "Under" - - - - **151**
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